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IDAHO CODE

CONTAINING THE

GENERAL LAWS OF IDAHO

ANNOTATED

ORIGINALLY PUBLISHED BY AUTHORITY OF
LAWS 1947, CHAPTER 224

REPUBLISHED BY AUTHORITY OF
LAWS 1949, CHAPTER 167 AS AMENDED

Compiled Under the Supervision of the
Idaho Code Commission

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TITLES 1-6

MICHIE

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PUBLISHER'S NOTE

Since the publication in 2004 of the last edition of this volume, many laws have been amended or repealed and many new laws have been enacted. The resulting increase in the size of the cumulative supplement for the former volume has made it necessary to revise this volume. Accordingly, this new volume with Replacement Titles 1 to 6 is issued with the approval and under the direction of the Idaho Code Commission.

This publication contains annotations taken from decisions of the Idaho Supreme Court and the Court of Appeals and the appropriate federal courts. These cases will be printed in the following reports:

Idaho Reports
Pacific Reporter, 3rd Series
Federal Supplement, 2nd Series
Federal Reporter, 3rd Series
United States Supreme Court Reports, Lawyers' Edition, 2nd Series

Following is an explanation of the abbreviations of the Court Rules used throughout the Idaho Code.

I.R.C.P.	Idaho Rules of Civil Procedure
I.R.E.	Idaho Rules of Evidence
I.C.R.	Idaho Criminal Rules
M.C.R.	Misdemeanor Criminal Rules
I.I.R.	Idaho Infraction Rules
I.J.R.	Idaho Juvenile Rules
I.C.A.R.	Idaho Court Administrative Rules
I.A.R.	Idaho Appellate Rules

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USER'S GUIDE

To assist the legal profession and the layperson in obtaining the maximum benefit from the Idaho Code, a User's Guide has been included in the first volume of this set.

ADJOURNMENT DATES OF SESSIONS OF LEGISLATURE

Article 3, § 22 of the Idaho State Constitution provides: "No act shall take effect until sixty days from the end of the session at which the same shall have been passed, except in case of emergency, which emergency shall be declared in the preamble or in the body of the law."

Section 67-510 Idaho Code provides: "No act shall take effect until July 1 of the year of the regular session or sixty (60) days from the end of the session at which the same shall have been passed, whichever date occurs last, except in case of emergency, which emergency shall be declared in the preamble or body of the law.

Every joint resolution, unless a different time is prescribed therein, takes effect from its passage."

This table is given in order that the effective date of acts, not carrying an emergency or which do not specify an effective date, may be determined with a minimum of delay.

Year	Adjournment Date
1921	March 5, 1921
1923	March 9, 1923
1925	March 5, 1925
1927	March 3, 1927
1929	March 7, 1929
1931	March 5, 1931
1931 (E.S.)	March 13, 1931
1933	March 1, 1933
1933 (E.S.)	June 22, 1933
1935	March 8, 1935
1935 (1st E.S.)	March 20, 1935
1935 (2nd E.S.)	July 10, 1935
1935 (3rd E.S.)	July 31, 1936
1937	March 6, 1937
1937 (E.S.)	November 30, 1938
1939	March 2, 1939
1941	March 8, 1941
1943	February 28, 1943
1944 (1st E.S.)	March 1, 1944
1944 (2nd E.S.)	March 4, 1944
1945	March 9, 1945
1946 (1st E.S.)	March 7, 1946
1947	March 7, 1947
1949	March 4, 1949
1950 (E.S.)	February 25, 1950
1951	March 12, 1951
1952 (E.S.)	January 16, 1952

1953	March 6, 1953
1955	March 5, 1955
1957	March 16, 1957
1959	March 9, 1959
1961	March 2, 1961
1961 (1st E.S.)	August 4, 1961
1963	March 19, 1963
1964 (E.S.)	August 1, 1964
1965	March 18, 1965
1965 (1st E.S.)	March 25, 1965
1966 (2nd E.S.)	March 5, 1966
1966 (3rd E.S.)	March 17, 1966
1967	March 31, 1967
1967 (1st E.S.)	June 23, 1967
1968 (2nd E.S.)	February 9, 1968
1969	March 27, 1969
1970	March 7, 1970
1971	March 19, 1971
1971 (E.S.)	April 8, 1971
1972	March 25, 1972
1973	March 13, 1973
1974	March 30, 1974
1975	March 22, 1975
1976	March 19, 1976
1977	March 21, 1977
1978	March 18, 1978
1979	March 26, 1979
1980	March 31, 1980
1981	March 27, 1981
1981 (E.S.)	July 21, 1981
1982	March 24, 1982
1983	April 14, 1983
1983 (E.S.)	May 11, 1983
1984	March 31, 1984
1985	March 13, 1985
1986	March 28, 1986
1987	April 1, 1987
1988	March 31, 1988
1989	March 29, 1989
1990	March 30, 1990
1991	March 30, 1991
1992	April 3, 1992
1992 (E.S.)	July 28, 1992
1993	March 27, 1993
1994	April 1, 1994
1995	March 17, 1995
1996	March 15, 1996
1997	March 19, 1997

1998	March 23, 1998
1999	March 19, 1999
2000	April 5, 2000
2001	March 30, 2001
2002	March 15, 2002
2003	May 3, 2003
2004	March 20, 2004
2005	April 6, 2005
2006	April 11, 2006
2006 (E.S)	August 25, 2006
2007	March 30, 2007
2008	April 2, 2008
2009	May 8, 2009
2010	March 29, 2010

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TITLE 1

COURTS AND COURT OFFICIALS

CHAPTER 1

ENUMERATION OF COURTS

1-101. Courts enumerated. — The following are the courts of justice of this state:

1. The Supreme Court.
2. The Court of Appeals.
3. The district courts.
4. The magistrate's division of the district courts.

History.

C.C.P. 1881, § 17; R.S., R.C., & C.L., § 3810; C.S., § 6440; I.C.A., § 1-101; am. 1969, ch. 108, § 1, p. 363; am. 1983, ch. 18, § 1, p. 52.

STATUTORY NOTES

Cross References.

District courts, § 1-701 et seq.

Emergency Interim Executive and Judicial Succession Act, § 59-1401 et seq.

Investiture of judicial power, Idaho Const., art. 5, § 2.

Judicial department, Idaho Const., art. 5.

Supreme Court, § 1-201 et seq.

Effective Dates.

Section 2 of S.L. 1969, ch. 108 provided that the act should be effective at 12:01 A.M. on January 11, 1971.

JUDICIAL DECISIONS

Cited in: Darrar v. Joseph, 91 Idaho 210, 419 P.2d 211 (1966).

1-102. Courts of record. — The courts enumerated in section 1-101, Idaho Code, are courts of record.

History.
C.C.P. 1881, § 18; R.S., R.C., & C.L., § 3811; C.S., § 6441; I.C.A., § 1-102; am. 2005, ch. 95, § 1, p. 315.

JUDICIAL DECISIONS

ANALYSIS

Presumption attaching to courts of record.
Records required.

Presumption Attaching to Courts of Record.
Everything is presumed as to proceedings of courts of record, or as to courts of general jurisdiction. Pedersen v. Moore, 32 Idaho 420, 184 P. 475 (1919).

Records Required.
Proceedings of the district court should be recorded either in the minutes or in the reporter's notes, whichever is appropriate to the nature of the proceedings had. Darrar v. Joseph, 91 Idaho 210, 419 P.2d 211 (1966).

RESEARCH REFERENCES

Am. Jur. — 20 Am. Jur. 2d, Courts, § 10.
C.J.S. — 21 C.J.S., Courts, § 1 et seq.

1-103. Probate, police and justice of the peace courts abolished — Transfer of jurisdiction. — All probate courts, justice of the peace courts, and police courts shall cease to exist on the date [January 11, 1971] as provided in this act. Wherever the words probate court, justice court or police court appear in the Idaho Code they shall mean the district court, or the magistrate's division of the district court, as the case may be, and any power, duty, responsibility, function or jurisdiction of the probate court, justice court or police court shall be transferred to the district court or the magistrate's division of the district court, as the case may be. Wherever the words judge, probate judge, justice of the peace or police judge appear in the Idaho Code they shall mean the district judge or the magistrate of the district court, as the case may be, and any power, duty, responsibility, function or jurisdiction of the probate judge, justice of the peace, or police judge shall be transferred to the district judge or the magistrate of the district court, as the case may be.

History.
1969, ch. 100, § 1, p. 344.

STATUTORY NOTES

Compiler's Notes.
Section 2 of S.L. 1969, ch. 100 read: "On the effective date of this act [January 11, 1971], all cases pending on the docket of the probate court shall be transferred to the docket of the district court for the county and be pending in such court, without affecting any bond or obligation in such cases. On the effective date

of this act, all functions, facilities and services of the probate court shall be transferred to the district court for the county and be continued in the district court. Judgments entered by the probate court but not yet satisfied, shall be enforceable in the manner provided by law for district court judgments. Civil and criminal matters pending before each probate court shall be continued in the district courts and be subject thereafter to the provisions of law and rules of procedure applicable in the district courts on the effective date of this act. All records, funds, bonds, or any other items pertaining to the cases or facilities transferred shall be forwarded forthwith by the clerk of the probate court to the clerk of the district court."

Section 3 of S.L. 1969, ch. 100 read: "The records and all cases terminated in the probate courts prior to the effective date of this act shall be placed in the custody of the clerk of the district court, and any proceeding to reopen these cases shall be brought there. The clerk of the district court shall have the power to certify the contents of these records in appropriate cases."

Section 4 of S.L. 1969, ch. 100 read: "(1) On the effective date of this act, all dockets and records of each justice of the peace shall be transferred to the district court of the county in which the justice precinct is located. Judgments entered by the justice of the peace, but not yet satisfied, shall be enforceable in the manner provided by law for district court judgments. Civil and criminal matters pending before each justice of the peace shall be continued in the district courts and be subject thereafter to the provisions of law and rules of procedure applicable in the district courts on the effective date of this act.

"(2) On the effective date of this act, all dockets and records of each police judge shall be transferred to the district court of the county in which the city is located. Judgments entered by the police judge, but not yet satisfied shall be enforceable in the manner provided by law for district court judgments. Criminal matters pending before each police judge shall be continued in the district courts and be subject thereafter to the provisions of law and rules of procedure applicable in the district courts on the effective date of this act."

Effective Dates.

This section became effective January 11, 1971, as provided in § 7 of S.L. 1969, ch. 100.

JUDICIAL DECISIONS

Cited in: Glasco v. Brassard, 94 Idaho 162, 483 P.2d 924 (1971); Olson v. Kirkham, 111 Idaho 34, 720 P.2d 217 (Ct. App. 1986).

1-104. All actions filed in district court. — From and after the effective date [January 11, 1971] of this act, all actions of any kind shall be filed in the proper district court, as provided by law or rules of the Supreme Court, and any provision of law to the contrary is hereby declared to be null and void and of no effect.

History.

1969, ch. 100, § 5, p. 344.

STATUTORY NOTES

Effective Dates.

This section became effective January 11, 1971, as provided in § 7 of S.L. 1969, ch. 100.

1-105. Criminal procedure — Supreme Court rules govern. — Procedures in the district court or magistrate's division of the district court involving criminal actions which, prior to January 11, 1971, were triable in the probate court, justice court or police court, shall be governed by rules of the Supreme Court.

History.
1969, ch. 100, § 6, p. 344; am. 1971, ch. 255, § 1, p. 1030.

STATUTORY NOTES

Effective Dates.
Section 7 of S.L. 1969, ch. 100 provided that the act should become effective at 12:01 A.M. on January 11, 1971.

Section 2 of S.L. 1971, ch. 255 declared an emergency. Approved March 25, 1971.

JUDICIAL DECISIONS

Appeal from Magistrate's Division.
In disposing of defendant's appeal from his conviction before the magistrate's division on charges of driving while under the influence of intoxicating beverages, the district court did not err in denying defendant a trial de novo and in electing to hear his appeal on the record made in the magistrate's division. State v. Griffith, 97 Idaho 52, 539 P.2d 604 (1975).

CHAPTER 2

SUPREME COURT

SECTION.

1-201. Constitution of court. — The Supreme Court consists of five (5) justices, a majority of whom shall be necessary to make a quorum or pronounce a decision. The justices of the Supreme Court shall be elected by the electors of the state at large. The terms of office of said justices shall be six (6) years. The chief justice shall receive an annual salary in an amount of one thousand five hundred dollars ($1,500) greater than the annual salary of the justices of the Supreme Court to compensate for the additional constitutional and statutory duties of the office.

History.
R.C., § 3814; reen. C.L., § 3814; C.S., § 6442; am. 1921, ch. 29, § 1, p. 37; I.C.A., § 1-201; am. 1985, ch. 29, § 1, p. 52.

STATUTORY NOTES

Cross References.
Clerk of the supreme court, duties, and deputies, §§ 1-402 to 1-408.
Constitutional provisions, Idaho Const., art. 5, §§ 6-10.
Contest of election of supreme court justices, § 34-2004.
Death sentences, review, § 19-2827.
Election, § 34-905.
Idaho Court of Appeals, § 1-2401 et seq.

Justice not to act as attorney or counsel, § 1-1803.
Justice not to have law partners, § 1-1804.
Justices ineligible for other offices, Idaho Const., art. 5, § 7.
Justices' retirement and compensation, § 1-2001 et seq.
Marriages, justices may solemnize, § 32-303.
Salaries of justices, § 59-502; Idaho Const., art. 5, §§ 17, 27.

JUDICIAL DECISIONS

Filling of Vacancies.
Under Idaho Const., art. 4, § 6, it is the duty of the governor to fill a vacancy in the office of justice of the supreme court by appointment, and the appointee holds office for the remainder of the term for which the original incumbent was elected. Budge v. Gifford, 26 Idaho 521, 144 P. 333 (1914).

1-202. Jurisdiction in general. — The jurisdiction of this court is of two (2) kinds:

1. Original; and
2. Appellate.

History.
C.C.P. 1881, § 19; R.S., R.C., & C.L., § 3815; C.S., § 6643; I.C.A., § 1-202.

JUDICIAL DECISIONS

Cited in: Burkhart v. Reed, 2 Idaho 503, 22 P. 1 (1889); Clough v. Curtis, 2 Idaho 523, 22 P. 8 (1889); Stout v. Cunningham, 29 Idaho 809, 162 P. 928 (1917).

RESEARCH REFERENCES

Am. Jur. — 20 Am. Jur. 2d, Courts, § 56 et seq.
C.J.S. — 4 C.J.S., Appeal and Error, § 52 et seq.
21 C.J.S., Courts, §§ 9, 10.

1-203. Original jurisdiction. — Its original jurisdiction extends to the issuance of writs of mandamus, certiorari, prohibition, habeas corpus, and all writs necessary or proper to the exercise of its appellate jurisdiction.

History.
C.C.P. 1881, § 20; R.S., R.C., & C.L., § 3816; C.S., § 6444; I.C.A., § 1-203.

STATUTORY NOTES

Cross References.
Certiorari, § 7-201 et seq.
Claims against state, Idaho Const., art. 5, § 10.
Election contests, § 34-2001 et seq.
Fee of clerk of supreme court for filing of original writ, § 1-402.
General powers of all courts, § 1-1603.
Habeas corpus, § 19-4201 et seq.
Incidental means to exercise jurisdiction, § 1-1622.
Incidental powers and duties of judicial officers, § 1-1901 et seq.
Justices may issue warrants for arrests, §§ 19-502, 19-503.
Mandamus, § 7-301 et seq.
Original jurisdiction, Idaho Const., art. 5, § 9.
Prohibition, § 7-401 et seq.
Rule-making power of supreme court, § 1-212.

JUDICIAL DECISIONS

ANALYSIS

Certiorari.

When the Constitution was adopted, jurisdiction was therein granted to the supreme court to issue the writ of certiorari then known and in use in the territory of Idaho, and none other. Neil v. Public Utils. Comm'n, 32 Idaho 44, 178 P. 271 (1919).

Habeas Corpus.

Upon application for writ of habeas corpus, the supreme court will not exercise the jurisdiction of an appellate court for the examination of questions reviewable on appeal. In re Knudtson, 10 Idaho 676, 79 P. 641 (1905).

The supreme court may make a writ of habeas corpus issued by it returnable before any district court. Jain v. Priest, 30 Idaho 273, 164 P. 364 (1917).

The supreme court may take original jurisdiction of an action involving the custody of a child. Jain v. Priest, 30 Idaho 273, 164 P. 364 (1917); Allen v. Williams, 31 Idaho 309, 171 P. 493 (1918).

Where application is made to a district court for a writ of habeas corpus involving the custody of a child, the petitioner can not abandon the proceeding thus initiated and institute a new one in the supreme court, original in character. Allen v. Williams, 31 Idaho 309, 171 P. 493 (1918).

In habeas corpus proceeding in federal district court where state prisoners had filed motions for new trial subsequent to conviction and had appealed to state supreme court where convictions were affirmed and prisoners had not exhausted the remedy of habeas corpus to the state supreme court, federal court assumed jurisdiction to determine petitions raising only the issues previously presented to the state district and supreme courts on the basis that there had been a practical exhaustion of state remedies and a different result appeared unlikely in the state courts. Drapeau v. May, 350 F. Supp. 1321 (D. Idaho 1972).

Mandamus.

A court, by means of writs of mandamus operating upon the officers of legislative bodies, cannot make up the records of the proceedings of these bodies, or cause alterations to be made in such records as prepared by the officer whose duty it was to prepare them. Clough v. Curtis, 134 U.S. 361, 10 S. Ct. 573, 33 L. Ed. 945 (1890).

Mandamus will not lie at the instance of the speaker of the house of representatives to require the secretary of the territory to deliver to him the journal of the house for correction after the adjournment of the session. Burkhart v. Reed, 2 Idaho 503, 22 P. 1 (1889), aff'd, Clough v. Curtis, 134 U.S. 361, 10 S. Ct. 573, 33 L. Ed. 945 (1890).

It is not within the scope of mandamus to confer power upon those to whom it is directed; it only enforces the exercise of power already existing when such exercise is a duty; therefore, the supreme court cannot, by writ of mandamus, require the territorial secretary to determine from the evidence what are the correct minutes of the legislature and to expunge certain matter from those minutes. Clough v. Curtis, 2 Idaho 523, 22 P. 8 (1889), aff'd, 134 U.S. 361, 10 S. Ct. 573, 33 L. Ed. 945 (1890).

Writ of mandate is the proper proceeding to compel the secretary of state to file and certify a ticket entitled to be filed and certified. Williams v. Lewis, 6 Idaho 184, 54 P. 619 (1898), overruled on other grounds, Stein v. Morrison, 9 Idaho 426, 75 P. 246 (1904).

Where application for declaratory judgment in mandamus was initiated to compel secretary of state to file petitioner's declaration of candidacy, the supreme court, in determining its jurisdiction to hear and decide the case, is only concerned with whether the action belongs to that class of cases of which supreme court has original jurisdiction. Boughton v. Price, 70 Idaho 243, 215 P.2d 286 (1950).

Prohibition.

Prohibition as authorized by the Idaho Constitution, is the common law writ and it will not issue to prohibit purely ministerial acts. Stein v. Morrison, 9 Idaho 426, 75 P. 246 (1904); Taylor v. Girard, 54 Idaho 787, 36 P.2d 773 (1934).

Writ of prohibition is not available unless there is no plain, speedy and adequate remedy in the ordinary course of law; however, in a proper case, the supreme court has the authority to issue such a writ. Muench v. Paine, 93 Idaho 473, 463 P.2d 939 (1970).

Cited in: Mahler v. Birnbaum, 95 Idaho 14, 501 P.2d 282 (1972); Lenaghen v. Smith, 97 Idaho 383, 545 P.2d 471 (1976); Idaho State Tax Comm'n v. Staker, 104 Idaho 734, 663 P.2d 270 (1982); Idaho Falls Redevelopment Agency v. Countryman, 118 Idaho 43, 794 P.2d 632 (1990).

RESEARCH REFERENCES

Am. Jur. — 20 Am. Jur. 2d, Courts, § 56 et seq.

A.L.R. — Civil actions removable from state court to federal court under 28 U.S.C.A. § 1443. 159 A.L.R. Fed. 377.

Who is "person acting under" officer of United States or any agency thereof for purposes of availability of right to remove state action to federal court under 28 U.S.C.A. § 1442(a)(1). 166 A.L.R. Fed. 297.

1-204. Appellate jurisdiction. — Its appellate jurisdiction extends to a review of all cases removed to it under such regulations as are now or may be prescribed by law, from the final decisions of the district courts, or the judges thereof.

History.

C.C.P. 1881, § 21; R.S., R.C., & C.L., § 3817; C.S., § 6445; I.C.A., § 1-204.

STATUTORY NOTES

Cross References.

Appeals in general, § 13-201 et seq.

Appellate jurisdiction as defined by Idaho Const., art. 5, § 9.

Appellate jurisdiction of decisions of board of medicine's committee of professional discipline, §§ 54-1806A, 54-1839.

Appellate rules, Idaho Appellate Rule 1 et seq.

Industrial accident board, appeals from orders of, Idaho Const., art. 5, § 9.

Industrial commission orders and awards, appellate jurisdiction, § 72-724.

Public utilities commissions, appeals from orders of, Idaho Const., art. 5, § 9.

Rule-making power of courts, § 1-212.

JUDICIAL DECISIONS

Analysis

Final judgment.
Method of acquiring.
Premature appeal.
Review of facts.

Final Judgment.

The allowance of an appeal from an order awarding the plaintiff in a divorce suit alimony for support pending her divorce would, in many instances, defeat the object and purpose of the statute allowing temporary alimony. Wyatt v. Wyatt, 2 Idaho 236, 10 P. 228 (1886).

Order of district court refusing to bring in additional parties, not being a final judgment, was not appealable. Weiser Irrigation Dist. v. Middle Valley Irrigation Ditch Co., 28 Idaho 548, 155 P. 484 (1916).

Appeal from order that denied defendant's motion for a summary judgment is not authorized by the legislature, which is constitutionally authorized to prescribe a system of appeals; thus, such order was not appealable. Wilson v. DeBoard, 94 Idaho 562, 494 P.2d 566 (1972).

Post-conviction petitioner's notice of appeal from a district court's notice of intent to dismiss, though premature and interlocutory in nature, was nevertheless sufficient to effectuate an appeal from a final order dismissing the petition four days after the petitioner's notice of appeal was filed. Weller v. State, 146 Idaho 652, 200 P.3d 1201 (Ct. App. 2008).

Method of Acquiring.

Jurisdiction of an appeal is acquired by the supreme court upon the filing of notice of appeal and undertaking within the time prescribed by law; but the filing and serving of the transcript within the time fixed by the rules of the court is not jurisdictional. Stout v. Cunningham, 29 Idaho 809, 162 P. 928 (1917).

Premature Appeal.

Since appeal which was prematurely taken did not confer jurisdiction on supreme court, dismissal of such appeal could not be considered to be an affirmance of district court judgment nor would it defeat an appeal regularly taken within the time and in the manner prescribed by law. Stout v. Cunningham, 33 Idaho 83, 189 P. 1107 (1920).

Review of Facts.

Where trial court determined a matter solely on affidavits, supreme court may consider the cause de novo with all of the powers possessed by the trial court. Cornelison v. Cornelison, 53 Idaho 266, 23 P.2d 252 (1932).

Cited in: Burkhart v. Reed, 2 Idaho 503, 22 P. 1 (1889); Spencer v. Idaho First Nat'l Bank, 106 Idaho 316, 678 P.2d 108 (Ct. App. 1984).

RESEARCH REFERENCES

Am. Jur. — 20 Am. Jur. 2d, Courts, § 68.

1-205. Disposition of appeals. — The court may reverse, affirm or modify any order or judgment appealed from, and may direct the proper judgment or order to be entered, or direct a new trial or further proceedings to be had. Its judgment must be remitted to the court from which the appeal was taken. The decisions of the court shall be given in writing; and in giving a decision, if a new trial be granted, the court shall pass upon and determine all the questions of law involved in the case presented upon such appeal, and necessary to the final determination of the case.

History.

C.C.P. 1881, § 22; R.S., R.C., & C.L., § 3818; C.S., § 6446; I.C.A., § 1-205.

STATUTORY NOTES

Cross References.

Constitutional provision as to terms of court, Idaho Const., art. 5, § 8.

Opinions, Idaho Appellate Rule 38.
Reporter of decisions, § 1-501 et seq.
Remittiturs, Idaho Appellate Rule 38.

JUDICIAL DECISIONS

Analysis

Application of Section.

If the findings of fact do not support the judgment, the judgment must be reversed. Ponting v. Isaman, 7 Idaho 581, 65 P. 434 (1901).

The provisions of this section apply to all appeals, whether taken on bills of exception or statements of the case both in actions at law and suits in equity; but in no form of appeal is the court required in its decisions to pass upon and determine all the questions of law involved in the case unless a new trial is granted. Work v. Kinney, 8 Idaho 771, 71 P. 477 (1902).

Although supreme court, in considering an appeal, grants a new trial on one assignment of error, it is proper for the court to consider other assignments of error which are neces-

sary to the final determination of the case. State v. Ash, 94 Idaho 542, 493 P.2d 701 (1972).

Consideration of Evidence.

Trial court and reviewing court in passing upon motion of non-suit will consider evidence in the light most favorable to the plaintiff. Koser v. Hornback, 75 Idaho 24, 265 P.2d 988 (1954).

Consideration of New Issues.

Where the court reversed defendant's conviction for illegal possession of controlled substances on the ground that the search warrant did not describe the place to be searched with particularity, the court properly considered other questions of law pertaining to the issuance of the search warrant which could arise on retrial. State v. Yoder, 96 Idaho 651, 534 P.2d 771 (1975).

Where the trial court found that no use tax return had been filed as to property used by a building contractor on a construction project, the supreme court properly considered the issue of whether part of an asserted deficiency in use tax payments was barred by the statute of limitations notwithstanding the tax commission's contention that the trial court made no ruling on the effect of the statute of limitations. Leonard Constr. Co. v. State ex rel. State Tax Comm'n, 96 Idaho 893, 539 P.2d 246 (1975).

Constitutional Issues.

Constitutional issues may be considered for the first time on appeal if necessary for subsequent proceedings in the case. Messmer v. Ker, 96 Idaho 75, 524 P.2d 536 (1974).

Correction of Mathematical Errors.

Error of trial court consisting merely in computation of earned premiums on a policy, being susceptible of mathematical computation, may be corrected on appeal without remanding the cause for a new trial. Maryland Cas. Co. v. Boise St. Car Co., 52 Idaho 133, 11 P.2d 1090 (1932).

Directed Verdict.

Where a party is entitled to have a verdict directed in his favor at the close of the evidence and the case is reversed on appeal, a new trial will not be ordered; the case will be remanded, with instructions that judgment be entered in his favor. Exchange State Bank v. Taber, 26 Idaho 723, 145 P. 1090 (1915).

Finality of Judgment.

The affirmance by the supreme court of a judgment of the trial court determining certain rights of parties is final as to such issues. Idaho Trust & Sav. Bank v. Ridenbaugh, 29 Idaho 647, 161 P. 868 (1916); Idaho Trust & Sav. Bank v. Nampa & Meridan Irrigation Dist., 29 Idaho 658, 161 P. 872 (1916).

Judgment based upon verdict of guilty and infliction of death penalty by jury is decision or judgment within meaning of this section. State v. Ramirez, 34 Idaho 623, 203 P. 279 (1921).

Reversal of judgment, with directions to enter judgment for appellant, was a final adjudication, and an order granting a new trial after remittitur was improper. Smith v. Canyon County Consol. School Dist. No. 34, 44 Idaho 187, 255 P. 642 (1927).

An order withholding sentence and placing a defendant on probation is not a final judgment since sentencing is deferred and is distinguishable from a judgment imposing sentence, which is a final judgment, though its execution is suspended. Franklin v. State, 87 Idaho 291, 392 P.2d 552 (1964).

Where final judgment or order of the lower tribunal is correct, but entered upon an incorrect theory, the judgment or order may be affirmed by the appellate court upon the correct theory. Layrite Prods. Co. v. Lux, 91 Idaho 110, 416 P.2d 501 (1966).

Interlocutory Orders.

Subdivision (e) of Idaho Appellate Rule 17 and this section are parallel provisions and both serve the ends of judicial economy; both contemplate that if there is a final appealable order before the supreme court, the court should resolve all interlocutory issues which have been passed upon by the trial court so that possibly another appeal will be avoided. Hence, although an order declaring part of decedent's property as separate or community was not normally an appealable order, the court addressed this issue where the magistrate court's order that the decedent's husband was not an omitted spouse was appealed. Keeven v. Wakley, 110 Idaho 452, 716 P.2d 1224 (1986).

Issues Not Assigned as Error.

Although failure of the trial court to submit to the jury the issue and law as to sudden peril was not specifically and separately assigned by appellants as error, since it does have a direct bearing on the issue of negligence on the part of a truck driver and since it is necessarily involved in the consideration of such negligence which is an assigned error, and was an issue which was likely to arise upon a new trial, the supreme court deemed it proper to discuss the issue. Barry v. Arrow Transp. Co., 80 Idaho 447, 333 P.2d 1008 (1958).

In disposing of an appeal by granting a new trial, supreme court should determine questions of law which may be necessary for the final determination of the case. Ore-Ida Potato Prods., Inc. v. United Pac. Ins. Co., 87 Idaho 185, 392 P.2d 191 (1964); Cassia Creek Reservoir Co. v. Harper, 91 Idaho 488, 426 P.2d 209 (1967).

Where a case involving sports arena owner's action against building contractor and architect to recover for damage to sports arena's artificial turf was to be reversed and remanded, the supreme court was required to confront question raised on appeal regarding the res judicata effect of the summary judgment entered in favor of the architect on the liability of building contractor who asserted as a defense that the architect's negligence was the cause of the damage. Idaho State Univ. v. Mitchell, 97 Idaho 724, 552 P.2d 776 (1976).

This section requires the supreme court, when remanding a case for further proceedings, to pass upon and determine all the questions of law involved in the case presented upon such appeal and the fact that an issue decided is not specifically and separately assigned by the parties as error does not alter this duty. Neilsen & Co. v. Cassia & Twin Falls County Joint Class A School Dist. 151, 103 Idaho 317, 647 P.2d 773 (Ct. App. 1982); Idaho Power Co. v. State, 104 Idaho 751, 661 P.2d 741 (1983); Olson v. Idaho Dep't of Water Resources, 105 Idaho 98, 666 P.2d 188 (1983); State v. Stoddard, 105 Idaho 533, 670 P.2d 1318 (Ct. App.), review denied, 116 Idaho 466, 776 P.2d 828 (1988).

This section allows the supreme court to decide all the issues in a remanded case that will be necessary for the final determination of the case, even though an issue so decided is not specifically and separately assigned by the parties as error. Keeven v. Wakley, 110 Idaho 452, 716 P.2d 1224 (1986).

Liberal Construction.

This section should be liberally construed and authorizes the supreme court, on affirming a decision of the trial court sustaining a demurrer, to set aside the judgment of that court dismissing the action in order to afford plaintiff an opportunity to amend, or to direct that court to issue a temporary restraining order. City of Boise City v. Artesian Hot & Cold Water Co., 4 Idaho 392, 39 P. 566 (1895).

Under this section a cause may be remanded, with instructions to take such further proceedings therein as may appear to be in accordance with justice, including authority to hear and determine appellant's motion to amend his complaint. Feehan v. Kendrick, 32 Idaho 220, 179 P. 507 (1918).

Modification of Judgment.

A judgment which improperly directs payment in a specified form of currency may be corrected by the supreme court without directing a new trial. Betts v. Butler, 1 Idaho 185 (1886).

A judgment which is too large in the amount of interest allowed should be modified and not reversed. Taylor v. Peterson, 1 Idaho 513 (1889).

If it reasonably appears that plaintiff might make a case, a new trial, and not an absolute reversal, will be granted. Miller v. Mullan, 17 Idaho 28, 104 P. 660 (1909).

Where decision sustaining demurrer was upon wrong ground, yet plaintiff could have avoided defect by amendment, cause will be remanded with instructions to allow motion for amendment, judgment to stand affirmed if motion not made in time limited. MacLeod v. Stelle, 43 Idaho 64, 249 P. 254 (1926).

Where court modifies judgment on grounds other than those urged on appeal, it may disallow, in its discretion, any costs. MacLeod v. Stelle, 43 Idaho 64, 249 P. 254 (1926).

Where judgment is rendered for full amount of claim and plaintiff conceded counterclaim in certain amount, same should be deducted from amount of recovery in appellate court. La Rocque v. Alho, 43 Idaho 405, 252 P. 675 (1927).

No procedure has been prescribed by the code for vacating a provision in a decree of divorce for the custody and maintenance of minor children of a marriage thereby dissolved. Cornelison v. Cornelison, 53 Idaho 266, 23 P.2d 252 (1933).

Reversal and Remand.

Where judgment is reversed and cause remanded for a new trial, it is the duty of the supreme court to pass upon and determine all the questions of law involved in the case presented upon such appeal and necessary to the final determination of the case. Bingham County v. Woodin, 6 Idaho 284, 55 P. 662 (1898).

Notwithstanding the provisions of this section, where the jury in an action for conversion was erroneously authorized to award punitive damages and the evidence as to the actual damages is confused and uncertain, the court will remand the cause for new trial rather than enter judgment for a less amount. Unfried v. Libert, 20 Idaho 708, 119 P. 885 (1911).

Where there has been no trial of the facts of the case in the probate court, a trial thereof, in the first instance, cannot be had in the district court upon appeal, but it must be remanded to the tribunal in which it originated. Smith v. Peterson, 31 Idaho 34, 169 P. 290 (1917).

Where case was required to be remanded for a new trial for error in non-suit of appellants, the rulings of trial court in excluding evidence offered by appellants would be discussed by the supreme court. McKee v. Chase, 73 Idaho 491, 253 P.2d 787 (1953).

If case is to be reversed and remanded for a new trial, it is duty of supreme court to pass on all questions of law presented on the appeal which are necessary to final determination of the case. State v. Spencer, 74 Idaho

173, 258 P.2d 1147 (1953).

Supreme court determined other questions presented by the parties after it had reached decision that judgment should be reversed. Head v. Crone, 76 Idaho 196, 279 P.2d 1064 (1955).

Where there was prejudicial error in failing to give instructions on appellant's theory of the case, necessitating a remand of the action for a new trial, issues raised by the appeal will be considered and resolved for final determination. Hackworth v. Davis, 87 Idaho 98, 390 P.2d 422 (1964).

Upon reversal and remand, the supreme court can undertake to resolve some of the issues raised in hearing below and argued on appeal, even though such proceedings were conducted by a disqualified judge. Lewiston Lime Co. v. Barney, 87 Idaho 462, 394 P.2d 323 (1964).

Scope of Trial Court Action After Remand.

Trial court will restrict its consideration in a remanded action to those questions specified in the mandate and will not reexamine issues already laid to rest by the appellate court affirmance on the preceding appeal. Tolman v. Tolman, 93 Idaho 374, 461 P.2d 433 (1969).

Where a new trial was not mandated by the supreme court in its remand order, district judge's decision to proceed without conducting a de novo trial was compatible with that order, as it is within a trial court's discretion to determine whether an existing record is sufficient or should be supplemented, in order to make the required findings of fact and conclusions of law on remand. Capps v. Wood, 117 Idaho 614, 790 P.2d 395 (Ct. App. 1990).

Summary Judgment.

On an appeal from a summary judgment, where the record showed a genuine dispute on material facts and the trial court was in error in granting the motion for summary judgment, the supreme court must decide questions of law presented by the appeal which are necessary to the final determination of the case. Layrite Prods. Co. v. Lux, 86 Idaho 477, 388 P.2d 105 (1964).

Cited in: Bingham County v. Woodin, 6 Idaho 284, 55 P. 662 (1898); Ponting v. Isaman, 7 Idaho 581, 65 P. 434 (1901); Madsen v. Whitman, 8 Idaho 762, 71 P. 152 (1902); Pacific States Sav., Loan & Bldg. Co. v. Dubois, 11 Idaho 319, 83 P. 513 (1905); Unfried v. Libert, 20 Idaho 708, 119 P. 885 (1911); Smith v. Peterson, 31 Idaho 34, 169 P. 290 (1917); Robinson v. St. Maries Lumber Co., 32 Idaho 651, 186 P. 923 (1920); Basinger v. Taylor, 36 Idaho 591, 211 P. 1085 (1922); Henderson v. Allis-Chalmers Mfg. Co., 65 Idaho 570, 149 P.2d 133 (1943); State v. Owen, 73 Idaho 394, 253 P.2d 203 (1952); State ex rel. McKinney v. Richardson, 76 Idaho 9, 277 P.2d 272 (1954); Gem State Mut. Life Ass'n v. Gray, 77 Idaho 157, 290 P.2d 217 (1955); National Motor Serv. Co. v. Walters, 85 Idaho 349, 379 P.2d 643 (1963); Dewey v. Keller, 86 Idaho 506, 388 P.2d 988 (1964); Mohr v. Shultz, 86 Idaho 531, 388 P.2d 1002 (1964); Clark v. Foster, 87 Idaho 147, 391 P.2d 853 (1964); Kelson v. Ahlborn, 87 Idaho 519, 393 P.2d 578 (1964); Yribar v. Fitzpatrick, 87 Idaho 366, 393 P.2d 588 (1964); Mountain Elec. Co. v. Swartz, 87 Idaho 403, 393 P.2d 724 (1964); State v. Grady, 89 Idaho 204, 404 P.2d 347 (1965); Hodge v. Borden, 91 Idaho 125, 417 P.2d 75 (1966); Whitt v. Jarnagin, 91 Idaho 181, 418 P.2d 278 (1966); State v. Gonzales, 92 Idaho 152, 438 P.2d 897 (1968); Matthews v. New York Life Ins. Co., 92 Idaho 372, 443 P.2d 456 (1968); Stewart v. Arrington Constr. Co., 92 Idaho 526, 446 P.2d 895 (1968); State v. Adjustment Dep't Credit Bureau, Inc., 94 Idaho 156, 483 P.2d 687 (1971); State v. Carver, 94 Idaho 677, 496 P.2d 676 (1972); Cox v. Stolworthy, 94 Idaho 683, 496 P.2d 682 (1972); Walter v. Potlatch Forests, Inc., 94 Idaho 738, 497 P.2d 1039 (1972); State v. Boyenger, 95 Idaho 396, 509 P.2d 1317 (1973); Dopp v. Union P.R.R., 95 Idaho 702, 518 P.2d 964 (1974); State v. Shaw, 96 Idaho 897, 539 P.2d 250 (1975); Olson v. Bedke, 97 Idaho 825, 555 P.2d 156 (1976); Smith v. Great Basin Grain Co., 98 Idaho 266, 561 P.2d 1299 (1977); Avondale Irrigation Dist. v. North Idaho Properties, Inc., 99 Idaho 30, 577 P.2d 9 (1978); Clark v. International Harvester Co., 99 Idaho 326, 581 P.2d 784 (1978); Paloukos v. Intermountain Chevrolet Co., 99 Idaho 740, 588 P.2d 939 (1978); State, Dep't of Law Enforcement v. One 1955 Willys Jeep, 100 Idaho 150, 595 P.2d 299 (1979); Tibbs v. City of Sandpoint, 100 Idaho 667, 603 P.2d 1001 (1979); Kolp v. Board of Trustees, 102 Idaho 320, 629 P.2d 1153 (1981); Huff v. Uhl, 103 Idaho 274, 647 P.2d 730 (1982); Suitts v. First Sec. Bank, 110 Idaho 15, 713 P.2d 1374 (1985); State v. Scroggie, 110 Idaho 103, 714 P.2d 72 (Ct. App. 1986); King v. State, Dep't of Emp., 110 Idaho 312, 715 P.2d 982 (1986); Software Assocs. v. State, Dep't of Emp., 110 Idaho 315, 715 P.2d 985 (1986); State v. Currington, 113 Idaho 538, 746 P.2d 997 (Ct. App. 1987); State v. Wheeler, 114 Idaho 97, 753 P.2d 833 (Ct. App. 1988); State v. Hester, 114 Idaho 688, 760 P.2d 27 (1988); Robertson v. Richards, 115 Idaho 628, 769 P.2d 505 (1989); Baker v. Shavers, Inc., 117 Idaho 696, 791 P.2d 1275 (1990); Olsen v. J.A. Freeman Co., 117 Idaho 706, 791 P.2d 1285 (1990); Sanchez v. Arave, 120 Idaho 321, 815 P.2d 1061 (1991); Bott v. Idaho State Bldg. Auth., 122 Idaho 471, 835 P.2d 1282 (1992); City of Idaho Falls v. Beco Constr. Co., 123 Idaho 516, 850 P.2d 165 (1993); State v. Allen, 123 Idaho

880, 853 P.2d 625 (Ct. App. 1993); State v. Seitter, 127 Idaho 356, 900 P.2d 1367 (1995); Dabestani ex rel. Dabestani v. Bellus, 131 Idaho 542, 961 P.2d 633 (1998).

1-206. Quorum — Adjournments. — The presence of three (3) justices is necessary for the transaction of business, but one (1) of the justices may adjourn the court from day to day with the same effect as if all were present.

History.
C.C.P. 1881, § 23; R.S., R.C., & C.L., § 3819; C.S., § 6447; am. 1921, ch. 29, § 2; I.C.A., § 1-206.

STATUTORY NOTES

Cross References.
Majority necessary to constitute a quorum or pronounce a decision, Idaho Const., art. 5, § 6.

1-207. Concurrence in decisions. — The concurrence of three (3) justices is necessary to pronounce a judgment; if three (3) do not concur, the case must be reheard.

History.
C.C.P. 1881, § 24; R.S., R.C., & C.L., § 3820; C.S., § 6448; am. 1921, ch. 29, § 3, p. 37; I.C.A., § 1-207.

STATUTORY NOTES

Cross References.
Majority must concur in decisions, Idaho Const., art. 5, § 6.

JUDICIAL DECISIONS

ANALYSIS

Second rehearing.
Statement of grounds.

Second Rehearing.
Where a rehearing is granted and the court fails to agree upon a decision in the case, it does not lose jurisdiction; and, under this section, another hearing must be ordered. Cameron Lumber Co. v. Stack-Gibbs Lumber Co., 26 Idaho 626, 144 P. 1114 (1914).

Statement of Grounds.
It is not necessary that concurring justices state the grounds of their conclusion. Northwestern & Pac. Hypotheekbank v. Hobson, 59 Idaho 119, 80 P.2d 793 (1938).

Cited in: Cameron Lumber Co. v. Stack-Gibbs Lumber Co., 26 Idaho 626, 144 P. 1114 (1914).

1-208. Terms and places of holding Supreme Court. — The Supreme Court, or any three (3) of the justices thereof, may, by an order, fix the times for holding the terms of the Supreme Court, which shall not be changed oftener than once in each year, except as herein provided. At least six (6) terms shall be held annually; two (2) terms at the seat of the state government, one (1) term at Lewiston, in Nez Perce County, one (1) term at Coeur d'Alene, in Kootenai County, one (1) term at Twin Falls, in Twin Falls County, and one (1) term at Pocatello, in Bannock County.

History.
1890-1891, p. 11, § 1; reen. 1899, p. 6, § 1; R.C., § 3821; am. 1913, ch. 52, § 1, p. 161; am. 1917, ch. 42, § 1, p. 93; compiled and reen. C.L., § 3821; C.S., § 6449; am. 1921, ch. 29, § 4, p. 37; I.C.A., § 1-208; am. 1969, ch. 26, § 1, p. 50.

JUDICIAL DECISIONS

Constitutionality.
Provision allowing legislation to alter provisions of Constitution as to terms of supreme court, and where they shall be held, does not warrant legislature to go further and limit place at which cause may be heard, except upon agreement of parties. Talbot v. Collins, 33 Idaho 169, 191 P. 354 (1920).

1-209. Places of holding court in case of emergency. — In case of epidemic, pestilence or destruction of courthouses, the justices may hold terms of the Supreme Court provided by the preceding section at other convenient places, to be fixed by a majority of the justices.

History.
R.C., § 3821; am. 1913, ch. 52, p. 161; am. 1917, ch. 42, § 1, p. 93; compiled and reen. C.L., § 3821a; C.S., § 6450; I.C.A., § 1-209.

STATUTORY NOTES

Cross References.
Constitutional provision as to places of holding court in case of emergency, Idaho Const., art. 5, § 8.

1-210. Bailiff, crier and messenger — Appointment and compensation. — The court shall have power to appoint a bailiff, crier and messenger when such officers are necessary whose duties shall be fixed by the court, and whose compensation for all services rendered to the state of Idaho shall be fixed by the court and certified to the state controller, and payable as provided by law.

History.
1890-1891, p. 11, §§ 2, 4; am. 1893, p. 63, § 3; reen. 1899, p. 6, § 2, last part of §§ 6, 7; compiled R.C. & C.L., § 3822; C.S., § 6452; am. 1921, ch. 29, § 5, p. 37; I.C.A., § 1-210; am. 1957, ch. 314, § 1, p. 672; am. 1994, ch. 180, § 1, p. 420.

STATUTORY NOTES

Effective Dates.
Section 2 of S.L. 1957, ch. 314 provided said act should take effect from and after July 1, 1957.

Section 241 of S.L. 1994, ch. 180 provided that such act should become effective on and after the first Monday in January, 1995 [January 2, 1995] if the amendment to the Constitution of Idaho changing the name of the state auditor to state controller [1994 S.J.R. No. 109, p. 1493] was adopted at the general election held on November 8, 1994. Since such amendment was adopted, the amendment to this section by § 1 of S.L. 1994, ch. 180 became effective January 2, 1995.

1-211. Expenses of Supreme Court officers. — There must be paid to each of the justices of the Supreme Court, and to the clerk of the Supreme Court, out of the state treasury, for each term of the Supreme Court held away from Boise City, his actual expenses for subsistence, and in addition thereto, his expenses of travel; also his actual expense for subsistence, and expense of travel in attendance to his other official duties as authorized by the Supreme Court.

The provisions hereof relating to payment of actual expenses for subsistence shall be expressly exempted from, and relating to expenses of travel shall be expressly governed by, the provisions of section 67-2008, Idaho Code, as amended.

History.
R.S., § 6151, as added by 1899, p. 181, § 2; am. 1903, p. 47, § 1; reen. R.C. & C.L., § 3823; C.S., § 6453; I.C.A., § 1-211; am. 1949, ch. 170, § 1, p. 368; am. 1955, ch. 66, § 1, p. 132; am. 1963, ch. 112, § 1, p. 335.

STATUTORY NOTES

Cross References.
Determination of rate of allowance, § 67-2008.
Retirement compensation, § 1-2001 et seq.
Salaries of justices, § 59-502.

1-212. Rule-making power recognized. — The inherent power of the supreme court to make rules governing procedure in all the courts of Idaho is hereby recognized and confirmed.

History.
1941, ch. 90, § 1, p. 163.

STATUTORY NOTES

Cross References.
Powers of courts to make rules for their own government, Idaho Civil Procedure Rule 1(c).
Rules governing attorneys and admission to bar, power to make, § 3-408.

JUDICIAL DECISIONS

ANALYSIS

Constitutionality.
Criminal procedure.
Particular rules.
Rules of evidence.

Constitutionality.
This section does not delegate legislative power to the supreme court, but recognizes the inherent power of the supreme court in the area of rule-making procedure in all courts. R.E.W. Constr. Co. v. District Court, 88 Idaho 426, 400 P.2d 390 (1965).

Criminal Procedure.
Absent legislative direction, the supreme court not only has the authority, but the duty, to adopt procedure designed to safeguard the rights of an accused to a fair and impartial trial. State v. Johnson, 86 Idaho 51, 383 P.2d 326 (1963).

Particular Rules.
Under this act, the supreme court may regulate the waiver of trial by jury. Allen Steel Supply Co. v. Bradley, 89 Idaho 29, 403 P.2d 859 (1965).

Based upon this section and Idaho Civil Procedure Rule 6(a), which governs computation of time periods, it is clear that the legislature and the supreme court were attempting to compensate for the closure of the clerk's office on weekends and holidays; in this regard, the time limitation contained in § 45-510, governing the duration of materialmen's liens is analogous to a statute of limitation and, when one considers the purpose of the rule and the statute, the only interpretation is that Idaho Civil Procedure Rule 6(a) is applicable to § 45-510. Cather v. Kelso, 103 Idaho 684, 652 P.2d 188 (1982).

Rules of Evidence.
Since the supreme court has the inherent power to promulgate procedural rules, it follows that the court also has the inherent power to establish rules of evidence, including a rule which allows a criminal defendant to be impeached by the use of a prior felony conviction. State v. Knee, 101 Idaho 484, 616 P.2d 263 (1980).

Cited in: State v. Jennings, 95 Idaho 724,

518 P.2d 1186 (1974); State v. Yoder, 96 Idaho 651, 534 P.2d 771 (1975); State v. Currington, 108 Idaho 539, 700 P.2d 942 (1985); State v. Beam, 121 Idaho 862, 828 P.2d 891 (1992); State v. District Court, 143 Idaho 695, 152 P.3d 566 (2007).

RESEARCH REFERENCES

Am. Jur. — 20 Am. Jur. 2d, Courts, §§ 48 to 56.

C.J.S. — 21 C.J.S., Courts, § 171 et seq.

1-213. Duty to make rules — Limitation. — The Supreme Court shall prescribe, by general rules, for all the courts of Idaho, the forms of process, writs, pleadings and motions, the manner of service, time for appearance, and the practice and procedure in all actions and proceedings. Said rules shall neither abridge, enlarge nor modify the substantive rights of any litigant.

History.
1941, ch. 90, § 2, p. 163.

STATUTORY NOTES

Cross References.
Appellate rules, Idaho Appellate Rule 1 et seq..

Power of district courts to make rules, Idaho Civil Procedure Rule 1(c).

JUDICIAL DECISIONS

Analysis

Criminal procedure.
Rules of evidence.

Criminal Procedure.
Absent legislative direction, the supreme court not only has the authority, but the duty, to adopt procedure designed to safeguard the rights of an accused to a fair and impartial trial. State v. Johnson, 86 Idaho 51, 383 P.2d 326 (1963).

Rules of Evidence.
Since the supreme court has the inherent power to promulgate procedural rules, it follows that the court also has the inherent power to establish rules of evidence, including a rule which allows a criminal defendant to be impeached by the use of a prior felony conviction. State v. Knee, 101 Idaho 484, 616 P.2d 263 (1980).

Cited in: R.E.W. Constr. Co. v. District Court, 88 Idaho 426, 400 P.2d 390 (1964); State v. Jennings, 95 Idaho 724, 518 P.2d 1186 (1974); State v. Currington, 108 Idaho 539, 700 P.2d 942 (1985).

1-214. Assistance in formulation of rules. — The Supreme Court is hereby authorized to appoint from among the district judges of Idaho and the members of the organized bar of Idaho such persons as it deems advisable to assist it in the formulation of such rules.

History.
1941, ch. 90, § 3, p. 163.

JUDICIAL DECISIONS

Cited in: R.E.W. Constr. Co. v. District Court, 88 Idaho 426, 400 P.2d 390 (1965); State v. Jennings, 95 Idaho 724, 518 P.2d 1186 (1974).

1-215. Assignment of justice pro tempore in event of vacancy, disqualification, disability or absence. — (1) When there is a vacancy in any of the positions of justice of the supreme court, and until the vacancy is filled as provided by law, the supreme court may assign a senior justice of the supreme court, an active or senior judge of the court of appeals, an active or senior district judge, or an active or senior magistrate judge to sit in a cause before the supreme court.

(2) When a justice of the supreme court is disqualified from sitting in a cause before the supreme court or is unable to sit in such cause because of disability or absence, the supreme court may assign a senior justice of the supreme court, an active or senior judge of the court of appeals, an active or senior district judge, or an active or senior magistrate judge to sit in such cause.

(3) A senior justice of the supreme court, an active or senior judge of the court of appeals, an active or senior district judge, or an active or senior magistrate judge assigned pursuant to this section shall exercise all of the powers of a justice of the supreme court as to the cause upon which he or she is assigned to sit.

History.
I.C., § 1-215, as added by 2008, ch. 34, § 1, p. 66.

STATUTORY NOTES

Prior Laws.
Former § 1-215, which comprised S.L. 1941, ch. 90, § 4, p. 163, was repealed by S.L. 1975, ch. 242, § 1.

CHAPTER 3

COMMISSIONERS FOR THE SUPREME COURT

1-301. Appointment from district judges — Duties — Compensation and expenses — Removal — Vacancies — Oath. — The Supreme Court of the state of Idaho may, at any time, appoint from among the duly elected, qualified and acting district judges of the state of Idaho, from any of the various counties or districts, one or more of such judges to act for such period of time as may be designated in the order appointing them, as commissioners of the Supreme Court; and upon grounds of the public service, the personnel of such commission may be changed from time to time as necessities and business of the several districts may require, by the designation of other district judges to act in the place and stead of those first designated. All that shall be legally required to constitute such commission, and authorize each commissioner to act, shall be the making and entering by the Supreme Court of the order of appointment or substitution of such

commissioners. It shall be the duty of said commissioners, under such rules and regulations as the court may adopt, to assist the Supreme Court in the performance of its duties and the disposition of the numerous causes now or hereafter pending in said court, and undetermined. None of such district judges shall be qualified to act for a longer period than that for which they were elected or appointed to serve in the capacity of district judges. None of such commissioners shall receive any salary or emolument whatsoever in addition to the salary already prescribed for them by law, but each and all shall be entitled to and be paid all actual and necessary expenses incurred by him in the performance of his duties hereunder, including when absent from the city of his residence, but not otherwise, actual and necessary expenses of travel and sustenance, all of which expenses shall be paid from the treasury of the state of Idaho in the same manner as are similar expenses of the justices of the Supreme Court, but out of the appropriation made for such purposes for district judges. The Supreme Court shall have the power to remove or substitute any or all members of said commission at any time, permanently or temporarily, and vacancies arising from any cause shall be filled by the Supreme Court. Before entering upon the discharge of their duties, each commissioner will be required to take and subscribe the constitutional oath of office.

History.
1923, ch. 11, § 1, p. 12; I.C.A., § 1-301.

STATUTORY NOTES

Cross References.
Expenses of supreme court officers, § 1-211.
Oath required of supreme court justices, Idaho Const., art. 5, § 17.

1-302. District judge — Direction to serve in another district. — In order not to interrupt or delay the expeditious transaction and disposition of district court business in the several counties or judicial districts on account of the establishment of such Supreme Court commission, or whenever it is deemed necessary to expedite the court business of any judicial district, it shall be within the province and power of the Supreme Court, on application of any district judge, or of its own motion, to direct any district judge in the state to serve for a stated period, or for specific purposes in any county or district other than that for which he shall have been elected or appointed.

History.
1923, ch. 11, § 2, p. 12; I.C.A., § 1-302.

STATUTORY NOTES

Cross References.
District judge directed by governor or chief justice to serve in another district, § 1-704.

1-303. Sessions of commission — Selection of personnel. — Such commission shall be by the Supreme Court called from time to time, and shall only be required to remain in session such length of time as is required for the hearing of such cases and conferences concerning decisions and conclusions to be reached, and in the designation of the personnel of any such commission or commissioner, the Supreme Court shall take into consideration the question of the necessities and the good of the judicial service to the Supreme Court and in the several counties of the state of Idaho; the Supreme Court shall make designation of appointment, substitution and transfer of judges with the idea in view of minimizing expense, and neither such commission nor the commissioners shall be required to remain absent from their respective districts for a longer time than is actually required for the proper performance of the work of such commission in aid of the Supreme Court.

History.
1923, ch. 11, § 3, p. 12; I.C.A., § 1-303.

CHAPTER 4

CLERK OF THE SUPREME COURT

1-401. Duties in general — Office. [Repealed.]

STATUTORY NOTES

Compiler's Notes.
This section, which comprised R.S., §§ 260, 263; compiled and reen. R.C. & C.L., § 212; C.S., § 189; I.C.A., § 1-401, was repealed by S.L. 1993, ch. 90, § 1, effective March 18, 1993.

1-402. Fees. — The clerk of the supreme court shall charge, demand and receive the following fees for services rendered in discharging the duties imposed upon him by law:

For filing an appeal in each civil case appealed to the supreme court, sixty-eight dollars ($68.00), to be paid by appellant or cross-appellant, such fee to be in full for all services rendered or to be rendered in filing papers, entering orders or judgments, recording opinion, issuing process and sending down remittitur, unless after the decision of the court has been rendered a petition for rehearing be presented, when a fee of sixty-one dollars ($61.00) shall be paid by the petitioner for filing such petition; for filing an application for any writ commencing an original action in said court, other than writs in habeas corpus or criminal proceedings, sixty-six dollars ($66.00), to be paid by the party presenting the application, in full for all services rendered or to be rendered, as hereinbefore designated, unless after the decision of the court a petition for rehearing be presented, when a fee of

sixty-one dollars ($61.00) shall be paid by the petitioner for filing such petition, for each certificate given at request, and under seal, two dollars and fifty cents ($2.50); for copy of record, opinion of the court or other paper, an amount to be set by order of the supreme court, but an amount not less than the actual cost of preparing the copy; providing, that one (1) copy of every opinion or decision of the court shall be forthwith mailed to each litigant or his counsel in the suit or proceeding free of charge; for certificate of admission as an attorney including seal, oath and order, four dollars ($4.00); for administering oaths or affirmations, including jurat, two dollars and twenty-five cents ($2.25); for taking an acknowledgment or proof of a deed or other instrument, including seal and writing of the certificate, two dollars and fifty cents ($2.50).

History.

1871, p. 15, § 3; R.S., § 262; R.C., § 213; am. 1917, ch. 18, § 1, p. 46; reen. C.L., § 213; C.S., § 190; I.C.A., § 1-402; am. 1941, ch. 151, § 1, p. 305; am. 1967, ch. 102, § 1, p. 211; am. 1981, ch. 238, § 2, p. 478; am. 1985, ch. 28, § 2, p. 48; am. 1988, ch. 24, § 1, p. 27; am. 1993, ch. 196, § 1, p. 535; am. 1996, ch. 256, § 1, p. 837.

STATUTORY NOTES

Cross References.

Additional fees for judges' retirement fund, § 1-2003.

Appeals, clerk's fees regarding, Idaho Appellate Rule 23.

Authority of clerk to administer oaths, § 1-405.

Clerk of supreme court to be appointed by the court, Idaho Const., art. 5, § 15.

Ex-officio reporter of supreme court, § 1-501.

JUDICIAL DECISIONS

Motion to Recall Remittitur.

Neither this section nor former court rule provided for fees or costs in connection with a motion to recall a remittitur and modify the judgment. Fite v. French, 54 Idaho 104, 30 P.2d 360 (1934).

RESEARCH REFERENCES

Am. Jur. — 15A Am. Jur. 2d, Clerks of Court, §§ 11 to 13, 16 to 23.

C.J.S. — 21 C.J.S., Courts, § 334.

1-403. Filing papers. — He must file all papers that may be legally lodged with him for that purpose, noting the day, month, and year when so filed.

History.

1864, p. 423, § 4; R.S., § 264; R.C. & C.L., § 214; C.S., § 191; I.C.A., § 1-403.

STATUTORY NOTES

Cross References.

Court seal to be affixed to copies of documents on file in office of clerk, § 1-1616.

RESEARCH REFERENCES

Am. Jur. — 15A Am. Jur. 2d, Clerks of Court, § 26.

1-404. Responsibility for books and papers. — He is responsible for the safe custody and delivery to his successor of all books and papers belonging to his office.

History.
1864, p. 423, § 5; R.S., § 265; R.C. & C.L., § 215; C.S., § 192; I.C.A., § 1-404.

1-405. Authority to administer oaths. — He may administer oaths in every case where an oath is authorized by law.

History.
1864, p. 423, § 6; R.S., § 266; R.C. & C.L., § 216; C.S., § 193; I.C.A., § 1-405.

STATUTORY NOTES

Cross References.
Fee for administering oaths, § 1-402.
Judicial officers may administer oaths, § 1-1901.
Oaths of office generally, § 59-401 et seq.

1-406. Prohibitions. — He must not practice as an attorney or counselor, nor be surety or bail in any case in the court of which he is clerk.

History.
1864, p. 423, § 7; R.S., § 267; R.C. & C.L., § 217; C.S., § 194; I.C.A., § 1-406.

1-407. Authority to take acknowledgments. — He is authorized to take acknowledgments of deeds and instruments of writing under the seal of his office.

History.
1864, p. 423, § 8; R.S., § 268; R.C. & C.L., § 218; C.S., § 195; I.C.A., § 1-407.

STATUTORY NOTES

Cross References.
Additional authority to take acknowledgments, § 55-701.
Fee for taking acknowledgments, § 1-402.

1-408. Official bond. — The clerk of the Supreme Court shall be bonded to the state of Idaho in the time, form and manner as prescribed by chapter 8, title 59, Idaho Code.

History.
1864, p. 423, § 2; R.S., § 269; R.C. & C.L., § 219; C.S., § 196; I.C.A., § 1-408; am. 1971, ch. 136, § 1, p. 522.

STATUTORY NOTES

Cross References.
Bonds of public officers generally, § 59-801 et seq.

1-409 Salary. [Repealed.]

STATUTORY NOTES

Compiler's Notes.
This section, which comprised 1893, p. 63, § 3; 1899, p. 6, § 4; R.C., § 220; reen. C.L., § 220; C.S., § 197; am. 1921, ch. 21, § 1, p. 30; I.C.A., § 1-409; am. 1953, ch. 66, § 1, p. 88; am. 1955, ch. 35, § 1, p. 54; am. 1957, ch. 315, § 2, p. 673; am. 1959, ch. 129, § 1, p. 272; am. 1961, ch. 322, § 1, p. 613, was repealed by S.L. 1977, ch. 178, § 11.

1-410. Deputy clerk — Appointment — Salary — Other deputies. [Repealed.]

STATUTORY NOTES

Compiler's Notes.
This section, which comprised 1893, p. 63, § 2; reen. 1899, p. 6, § 5; modified by 1899, p. 6, § 4, and 1903, p. 42, § 12; compiled and reen. R.C. & C.L., § 221; C.S., § 198; am. 1921, ch. 21, § 2, p. 30; I.C.A., § 1-410, was repealed by S.L. 1993, ch. 90, § 1, effective March 18, 1993.

CHAPTER 5

SUPREME COURT REPORTER

1-501. Clerk to be ex officio reporter. — The clerk of the Supreme Court shall be ex officio reporter of the decisions of the Supreme Court.

History.
1903, p. 367, § 1; reen. R.C. & C.L., § 222; C.S., § 199; am. 1921, ch. 21, § 3, p. 30; I.C.A., § 1-501.

1-502. Decisions to be reported. — The reporter must prepare a report of all decisions of such court.

History.
1903, p. 367, § 2; reen. R.C., § 223; compiled and reen. C.L., § 223; C.S., § 200; I.C.A., § 1-502.

1-503. Preparation of decisions. — The decisions shall be prepared for publication by giving the title to each case, a syllabus of the points decided, and the names of the counsel appearing in the Supreme Court in the case, and each volume shall contain, at the end thereof, a full and comprehensive index alphabetically arranged, and there shall be prefixed thereto a table of cases decided, and a table of statutes and constitutional

provisions construed.

History.
1903, p. 367, § 3; am. R.C. & C.L., § 224; C.S., § 201; I.C.A., § 1-503; am. 1967, ch. 108, § 1, p. 217.

1-504. Name and arrangement of reports. — Volumes published under the provisions of this article shall be called "Idaho Reports, Volume — ." Volumes shall be numbered consecutively. Each volume shall commence with the decisions immediately following those reported in the preceding volume. All decisions shall be reported in the order in which they were handed down, chronologically. All volumes shall be uniform in size and amount of matter contained, with volume 1, Idaho Reports, new series, and the style of type the same and composition shall be similar, and the paper and binding and all material and work, including sewing, shall be equally as good, and similar to that used in said volume 1, Idaho Reports, new series. Each volume of said reports when printed shall contain not less than eight hundred (800) pages, exclusive of the index thereto.

History.
1903, p. 361, § 4; am. R.C., § 225; compiled and reen. C.L., § 225; C.S., § 202; I.C.A., § 1-504.

1-505. Distribution of reports. — The reporter shall have no pecuniary interest in the reports. The decisions of the said Supreme Court shall be prepared for publication, by the reporter, as rapidly as possible, and as soon as a sufficient number of decisions are prepared to fill a volume, such a volume shall be printed, and as many copies thereof as directed by the administrative director of the courts, shall be delivered to the state law librarian, who shall distribute them as follows: To the Librarian of Congress, three (3) copies; to the Idaho State Law Library, five (5) copies; to the University of Idaho, general library, two (2) copies; to the Idaho State University Library, one (1) copy; to Boise State University Library, one (1) copy; to the College of Law of the University of Idaho, twelve (12) copies; to the Lewis-Clark State College, one (1) copy; to the library at the state penitentiary, one (1) copy; to each county prosecuting attorney, one (1) copy; to each magistrate, one (1) copy; to each district judge, one (1) copy; to each justice of the Supreme Court, one (1) copy; to the clerk of the Supreme Court, one (1) copy; to the attorney general five (5) copies; one (1) copy to the Department of Lands of Idaho; one (1) copy to the Public Utilities Commission of Idaho; one (1) copy to the Industrial Commission; one (1) copy to the Division of Public Works; one (1) copy to the Department of Insurance; one (1) copy to the Judiciary Committee of the Senate during sessions of the Legislature; one (1) copy to the Judiciary Committee of the House of Representatives during sessions of the Legislature; to each state and territory in the United States sending to this state copies of its printed court reports, one (1) copy for the use of the state library or law library thereof; to each foreign state or country, sending to this state copies of its printed court reports, one (1) copy; to the governor, secretary of state, state treasurer, state controller, superintendent of public instruction, each one (1) copy; and to other officers and institutions as directed by the administrative director of the courts; provided, that each public officer receiving a copy of any

volume or volumes of said reports under the provisions of this section, shall take good care of the same, and shall upon retiring from office, turn the same over to his successor in office, provided further, that copies of any volume of such reports may be again issued to any of said officers, institutions, states or territories upon good and sufficient proof of loss of the copies sought to be replaced, presented to the administrative director of the courts, who may direct the librarian to furnish another copy of the volume so lost, in place thereof.

History.
1903, p. 367, § 5; am. R.C., § 226; compiled & reen. C.L., § 226; C.S., § 203; am. 1925, ch. 7, § 1, p. 9; I.C.A., § 1-505; am. 1935, ch. 43, § 2, p. 79; am. 1939, ch. 28, § 1, p. 58; am. 1959, ch. 73, § 1, p. 165; am. 1969, ch. 122, § 1, p. 382; am. 1978, ch. 152, § 1, p. 334; am. 1994, ch. 180, § 2, p. 420.

STATUTORY NOTES

Cross References.
Administrative director of the courts, § 1-611.
Bonds of public officers generally, § 59-801 et seq.
Department of lands, § 58-101 et seq.
Division of public works, § 67-5705.

Effective Dates.
Section 2 of S.L. 1969, ch. 122 provided that the act should become effective at 12:01 A.M. on January 11, 1971.
Section 2 of S.L. 1978, ch. 152 provided that the act should take effect on and after July 1, 1978.

1-506. Contract to print reports. — The contract to print the reports of such decisions shall be let by the reporter with the approval of the justices of the supreme court, or a majority thereof, to some person or persons who will print the same on terms most advantageous to the state, and who will furnish the state with a maximum of four hundred (400) copies of each volume, the exact number of copies to be determined by the supreme court, at a cost to be fixed in such contract per volume and who will agree to furnish copies of the reports to the public at a price not exceeding the cost per volume at which the same is to be furnished to the state: provided, the work shall be done in the state of Idaho, if responsible parties therein offer to do said work on terms as favorable to the state as any outside bidder.

History.
1903, p. 367, § 6; reen. R.C. & C.L., § 227; C.S., § 204; I.C.A., § 1-506; am. 1945, ch. 120, § 1, p. 187; am. 2003, ch. 114, § 1, p. 358.

1-507. Bond of printer. [Repealed.]

STATUTORY NOTES

Compiler's Notes.
This section, which comprised 1903, p. 367, § 7; reen. R.C. & C.L., § 228; C.S., § 205; I.C.A., § 1-507, was repealed by S.L. 2003, ch. 114, § 2.

1-508. Receipt to printer — Record and receipt for reports distributed. — The librarian of the state law library shall give to the contracting printer a receipt for all copies of reports of said decisions delivered to him by such printer, and the librarian shall keep a correct record, in a book kept especially for that purpose, of all volumes received and distributed under the provisions of this chapter, and shall take a receipt for

all copies of such reports distributed, and file and preserve the same.

History.
1903, p. 367, § 8; am. R.C., § 229; reen. C.L., § 229; C.S., § 206; I.C.A., § 1-508; am. 1959, ch. 73, § 2, p. 165.

CHAPTER 6

OTHER COURT OFFICERS — COORDINATOR OF COURTS

SECTION.

1-601. Reference to code provisions concerning other court officers. — Other officers of courts are the clerks of the district courts; stenographic reports [reporters], and the crier, bailiff and messenger of the Supreme Court. The office, bond, fees and general duties of the clerks of the district courts are provided for elsewhere in this code, and the appointment, compensation and duties of the other officers mentioned in this section are provided for in the Code of Civil Procedure and the Penal Code.

History.
R.C. & C.L., § 230; C.S., § 207; I.C.A., § 1-601; am. 1969, ch. 123, § 1, p. 383.

STATUTORY NOTES

Cross References.
Clerks of district courts: election, Idaho Const., art. 5, § 16; duties in general, § 1-1001; deputies, § 1-1002; bond, § 31-2015; fees, § 31-3201.
Stenographic reporters, § 1-1101 et seq.
Supreme Court crier, bailiff and messenger, § 1-210.

Compiler's Notes.
The bracketed word "reporters" was inserted by the compiler.
The words "this code" refer to the Code of Civil Procedure which is a division of the Idaho Code consisting of Titles 1 through 13. The Penal Code is a division of the Idaho Code consisting of Titles 18 through 20.

Effective Dates.
Section 2 of S.L. 1969, ch. 123 provided that the act should be effective at 12:01 A.M. on January 11, 1971.

JUDICIAL DECISIONS

Cited in: Crooks v. Maynard, 112 Idaho 312, 732 P.2d 281 (1987).

1-602 — 1-610. [Reserved.]

1-611. Administrative director of courts — Appointment by Supreme Court — Term — Compensation. — There is hereby established the office of the administrative director of the courts of the state of Idaho.

The Supreme Court shall appoint and fix the compensation of the administrative director, he to devote his full time to the duties of such office and to serve at the pleasure of the court.

History.
1949, ch. 93, § 1, p. 168; am. 1967, ch. 39, § 1, p. 61; am. 1974, ch. 14, § 1, p. 300.

1-612. Duties of administrative director. — The administrative director, acting under the supervision and direction of the Supreme Court, shall:

(a) Procure data from time to time and as of the close of each calendar year with respect to these matters: the business transacted by the various courts of Idaho; the state of their dockets; the needs, if any, for assistance to expedite the handling of judicial business pending in the courts; and such other matters as, in the judgment of the Supreme Court, bear on the work and the administration of the judicial system of the state.

(b) Report to the Supreme Court from time to time concerning the need for assistance in the handling of pending business in any court of Idaho, and recommended means for meeting the need.

(c) Report to the Supreme Court and the governor for each calendar year, as of the close of the year, concerning the data procured as provided in (a) above and as to the work of the administrative director's office, one (1) copy of each report to be made public by filing with the clerk of the Supreme Court, one (1) to be furnished to the board of commissioners of the Idaho state bar, and one (1) to the legislative counsel; and report to the Supreme Court on these data at such other times as may be requested by the chief justice.

(d) Examine the administrative and business methods and systems employed in the offices of the judges, clerks and other officers of the courts related to and serving the courts, and make recommendations to the Supreme Court for improvement.

(e) Formulate and submit to the Supreme Court recommendations for the improvement of the judicial system.

History.
1949, ch. 93, § 2, p. 168; am. 1967, ch. 39, § 2, p. 61; am. 1974, ch. 14, § 2, p. 300.

1-613. Judicial assistance needed in given district — Assignment of judge. — Whenever the administrative director's report indicates that there is need for judicial assistance in any court, the Supreme Court shall assign to that court any judge for a fixed period or for specific purposes. Any judge so assigned shall serve without additional compensation, but shall be paid all reasonable expenses actually incurred by him in the performance of his duties hereunder, including reasonable expenses of travel and sustenance when required to perform duties outside the city of his residence.

History.
1949, ch. 93, § 3, p. 168; am. 1967, ch. 39, § 3, p. 61; am. 1974, ch. 14, § 3, p. 300.

JUDICIAL DECISIONS

Cited in: McGill v. Lester, 105 Idaho 692, 672 P.2d 570 (Ct. App. 1983).

1-614. Judges and clerks of courts — Duties — Access to records. — (a) The judges, clerks and other officers of the courts shall comply with the requests made by the administrative director for the inspection, standardization, and improvement of the records and systems employed in the offices of the judges, clerks and other officers of the courts, in furtherance of section 1-612, Idaho Code.

(b) It shall be the duty of the judges, clerks and other officers of the courts, when requested by the administrative director, to report promptly on all matters within the scope of (a) of section 1-612, Idaho Code, on which a report is requested. The administrative director shall have access to the official records of the judge, clerk and other officers of any court at all reasonable times in the performance of his duties under this act.

History.
1949, ch. 93, § 4, p. 168; am. 1950 (E.S.), ch. 4, § 1, p. 14; am. 1967, ch. 39, § 4, p. 61; am. 1974, ch. 14, § 4, p. 300.

STATUTORY NOTES

Cross References.
Administrative director, duties, § 1-612.

Compiler's Notes.
The words "this act" refer to S.L. 1949, ch. 93 compiled as §§ 1-611 to 1-615.

JUDICIAL DECISIONS

Cited in: Crooks v. Maynard, 112 Idaho 312, 732 P.2d 281 (1987).

1-615. Supreme Court may provide assistants — Clerical assistance. — The Supreme Court may provide such assistants and clerical assistance to the administrative director as may be deemed necessary to perform the duties and responsibilities imposed on him by this act.

History.
1949, ch. 93, § 5, p. 168; am. 1967, ch. 39, § 5, p. 61; am. 1974, ch. 14, § 5, p. 300.

STATUTORY NOTES

Compiler's Notes.
The words "this act" refer to S.L. 1949, ch. 93 compiled as §§ 1-611 to 1-615.

Effective Dates.
Section 6 of S.L. 1967, ch. 39, provided that the act should become effective on and after July 1, 1967.

CHAPTER 7
DISTRICT COURTS

1-701. District courts established. — District courts are hereby established to be held in each of the counties of the state which have been or may hereafter be organized by law, for the purpose of hearing and determining all matters and causes arising under the laws of this state.

History.
R.S., § 6146; am. R.C., § 3829; am. 1911, ch. 4, § 1, p. 6; reen. C.L., § 3829; C.S., § 6454; I.C.A., § 1-701.

STATUTORY NOTES

Cross References.

Child protection actions, procedure, Idaho Juvenile Rules 29 to 50.

Clerk of district court, § 1-1001 et seq.

Court crier, sheriff to act as, § 31-2215.

Criminal proceedings, rules of practice, Idaho Criminal Rule 1 et seq.

Disqualification of judge, Idaho Civil Procedure Rules 40(d)(1), 40(d)(2), 40(d)(4), 40(d)(5).

District court judges to act as supreme court commissioners, § 1-301 et seq.

Filling vacancies in judgeship, § 59-905 et seq.

Holding court out of district, Idaho Const., art. 5, § 12.

Incidental means to exercise jurisdiction, § 1-1622.

Infraction proceedings, Idaho Infraction Rule 1 et seq.

Inherent powers of courts, § 1-1603.

Judge not to act as attorney or counsel in certain cases, §§ 1-1802, 1-1803.

Judges pro tem., Idaho Const., art. 5, § 12.

Judges, qualifications and term of office, Idaho Const., art. 5, §§ 11, 12, 23.

Judges' retirement and compensation, § 1-2001 et seq.

Judicial districts, Idaho Const., art. 5, § 11; § 1-801 et seq.

Misdemeanor criminal proceedings, Idaho Misdemeanor Criminal Rule 1 et seq.

Salaries of judges, § 59-502.

Sheriff to attend court and obey orders and directions, § 31-2202.

Supreme Court reports to be distributed to each district judge, § 1-505.

JUDICIAL DECISIONS

Analysis

Misnaming court in appeal.
Presumption attaching to proceedings of court of general jurisdiction.

Misnaming Court in Appeal.

Where on an appeal from a justice court to a district court, the latter is improperly designated, unless it is shown to have misled or deceived the opposite party, the appeal will not be dismissed. Darling v. Fremstadt, 22 Idaho 684, 127 P. 674 (1912).

Presumption Attaching to Proceedings of Court of General Jurisdiction.

The rule as to the verity attaching to proceedings of a court of record or a court of general jurisdiction is inapplicable to a case where an officer seeks to justify a levy upon property under a writ of execution or attachment when the property is claimed by a stranger to the writ; then nothing is presumed and everything must be proved; in case of an attachment, the indebtedness to the plaintiff in the attachment suit or action must also be proved. Sears v. Lydon, 5 Idaho 358, 49 P. 122 (1897).

There is no presumption in favor of the proceedings of a court of general jurisdiction unless the court is proceeding according to the course of common law. There is no presumption indulged when a court of general jurisdiction is exercising a statutory power; therefore, no presumption indulged in favor of the validity of proceedings in divorce actions since they are purely statutory and were unknown to the common law. Platts v. Platts, 37 Idaho 149, 215 P. 464 (1923).

Cited in: Hodges v. Tucker, 25 Idaho 563, 138 P. 1139 (1914).

RESEARCH REFERENCES

C.J.S. — 21 C.J.S., Courts, § 132 et seq.

1-702. District judges — Election and term — New district judgeship and appointment to fill vacancy. — The district court is presided over by district judges chosen by the qualified electors of their respective districts for a term of four (4) years, except that upon the creation of a new district judgeship in any district or upon the appointment by the governor to fill a vacancy in a district judgeship in any district, such judge shall be appointed to hold office until the first Monday in January following the next general election for district judges occurring at least one (1) year following the date of the judge's appointment and until his successor is elected and qualified.

History.

R.C., § 3829; am. 1911, ch. 4, § 1, p. 6; compiled and reen. C.L., § 3829a; C.S., § 6455; I.C.A., § 1-702; am. 2002, ch. 214, § 1, p. 593; am. 2007, ch. 1, § 1, p. 3.

STATUTORY NOTES

Cross References.

Election of district judges, § 34-616.

Judge not to have law partner, § 1-1804.

Rule-making power, Idaho Civil Procedure Rule 1(c).

Supreme Court commissioner, appointment of district judges as, § 1-301 et seq.

Amendments.

The 2007 amendment, by ch. 1, inserted "the first Monday in January following".

Effective Dates.

Section 2 of S.L. 2002, ch. 214 declared an emergency. Approved March 22, 2002.

JUDICIAL DECISIONS

Holding Over.

The provision that district judges shall hold office until the next general election and until their successors are elected and qualified applies only to appointed district judges. Jordan v. Pearce, 91 Idaho 687, 429 P.2d 419 (1967).

Cited in: Hodges v. Tucker, 25 Idaho 563, 138 P. 1139 (1914); Tway v. Williams, 81 Idaho 1, 336 P.2d 115 (1959).

1-703. Jurisdiction of judges where more than one — Administrative judge. — Where there is more than one (1) judge in any district, the jurisdiction of the respective judges of said district shall be equal and coextensive with the boundaries of the district. In each judicial district there shall be an administrative judge elected by a majority of the district judges within the district to serve for a period of time as provided by rules of the Idaho supreme court. In the event a majority of the district judges cannot agree as to who shall be the administrative judge, then the appointment of the administrative judge shall be by a majority of the Idaho supreme court

justices for a period of time as provided by rules of the Idaho supreme court. The administrative judge is hereby granted all powers and duties heretofore or hereafter granted to the senior district judge, and the administrative judge shall apportion the business of such district among such judges as equally as may be, but any judge shall have full power to hold terms of court, transact judicial business, make orders, grant or refuse writs and generally exercise all the powers of a district judge without the concurrence of the other judge or judges. The administrative judge shall receive an annual salary in an amount of one thousand five hundred dollars ($1,500) greater than the annual salary of a district judge to compensate for the additional duties of the office.

History.
1911, ch. 4, § 1, p. 6; compiled and reen. C.L., § 3829b; C.S., § 6456; I.C.A., § 1-703; am. 1973, ch. 306, § 1, p. 666; am. 1974, ch. 26, § 1, p. 804; am. 1985, ch. 29, § 2, p. 52; am. 2004, ch. 320, § 1, p. 904.

STATUTORY NOTES

Cross References.
Number of judges in each judicial district, § 1-801 et seq.

JUDICIAL DECISIONS

ANALYSIS

Authority of succeeding district judge.
Execution after death of trial judge.
Order for change of venue.

Authority of Succeeding District Judge.
District judge who took over for the other district judge upon remand of proceedings was entitled to pass upon motion to strike appellant's amended answer and cross complaint as well as upon the merits. Land Dev. Co. v. Cannaday, 77 Idaho 237, 290 P.2d 1087 (1955).

Execution after Death of Trial Judge.
Upon the death of the trial judge, any other judge of the district may carry into effect a death sentence imposed by the deceased judge after the conviction had been affirmed on appeal. State v. Van Vlack, 58 Idaho 248, 71 P.2d 1076 (1937).

Order for Change of Venue.
An order for change of venue should not designate the particular judge to try the case, since the senior judge of a district must apportion the business. Callahan v. Callahan, 30 Idaho 431, 165 P. 1122 (1917).

Cited in: Crooks v. Maynard, 112 Idaho 312, 732 P.2d 281 (1987).

RESEARCH REFERENCES

Am. Jur. — 46 Am. Jur. 2d, Judges, § 25.
C.J.S. — 48A C.J.S., Judges, § 138 et seq.

1-704. District judge — Power to hold court in another district. — A district judge may hold a court in any county in this state upon the request of the judge of the district in which such court is to be held; and when by reason of sickness or absence from the state, or from any other cause a court cannot be held in any county in a district by the judge thereof, a certificate of that fact must be transmitted by the clerk to the governor or chief justice of the Supreme Court, who may thereupon direct some other district judge

to hold such court.

History.
C.C.P. 1881; R.S., R.C., & C.L., § 3886; C.S., § 6492; I.C.A., § 1-704; am. 1969, ch. 162, § 1, p. 496.

STATUTORY NOTES

Cross References.
Constitutional provision, Idaho Const., art. 5, § 12.
Disqualification of judge for bias or prejudice, Idaho Civil Procedure Rule 40(d)(2).
New judge assigned where judge disqualified, Idaho Civil Procedure Rule 40(d)(5).
Powers of supreme court to direct district judge to hold court in another district, § 1-302.
Proceedings on disqualification of judge of district, Idaho Civil Procedure Rule 40(d)(5).
Selection of new venue upon change of venue, Idaho Civil Procedure Rule 40(e).

JUDICIAL DECISIONS

Analysis

Jurisdiction presumed valid.
Place of signing, findings of fact, conclusions and judgments.
Power of substitute judge.

Jurisdiction Presumed Valid.
Where a district judge from one district holds court in another district and no question is raised as to his authority, it will be presumed, unless the record discloses to the contrary, that he was lawfully exercising jurisdiction; such jurisdiction is exercised under color of authority and is not open to collateral attack. Ex parte Allen, 31 Idaho 295, 170 P. 921 (1918). See also Kettenbach v. Walker, 32 Idaho 544, 186 P. 912 (1919).
In an action appointing a receiver ex parte in the second judicial district, the judge was temporarily unable to act; therefore, the judge of the tenth judicial circuit was requested to serve. The matter was presented to such judge, and he had jurisdiction in the appointment of a receiver ex parte. Murphy v. McCarty, 69 Idaho 193, 204 P.2d 1014 (1949).

Place of Signing, Findings of Fact, Conclusions and Judgments.
A judgment rendered by a judge of another county or district called in by a disqualified judge is not invalid because he signed his findings and conclusions and order for the judgment at home and was not in the county of the trial when the judgment was entered. Greene v. Edgington, 37 Idaho 1, 214 P. 751 (1923).

Power of Substitute Judge.
A judge of one district called into another district to try a case pending in the latter district has all the powers of the judge of that district for the purposes of that case and may make an order extending the time for preparing and presenting any and all papers necessary therefor, or for the filing of affidavits and motions for a new trial. Morris v. Lemp, 13 Idaho 116, 88 P. 761 (1907).

Cited in: Ferguson v. McGuire, 17 Idaho 141, 104 P. 1028 (1909); Long v. Hendricks, 109 Idaho 73, 705 P.2d 78 (Ct. App. 1985).

RESEARCH REFERENCES

Am. Jur. — 46 Am. Jur. 2d, Judges, § 24.
C.J.S. — 48A C.J.S., Judges, § 157 et seq.
A.L.R. — Power of successor or substitute judge in civil case to render decision or enter judgment on testimony heard by predecessor. 22 A.L.R.3d 922.
Construction and validity of state provisions governing designation of substitute, pro tempore, or special judge. 97 A.L.R.5th 537.

1-705. Jurisdiction — Original and appellate. — The district court has original jurisdiction:

1. In all cases and proceedings.

2. In the issuance of writs of mandamus, certiorari, prohibition, habeas corpus and all writs necessary to the exercise of its powers.

3. Its appellate jurisdiction extends to all cases assigned to magistrate's division of the district court; and to all other matters and cases wherein appeal is allowed by law.

History.

R.S., § 3830; am. 1899, p. 125, § 1; compiled R.C. & C.L., § 3830; C.S., § 6457; I.C.A., § 1-705; am. 1969, ch. 107, § 1, p. 362.

STATUTORY NOTES

Cross References.

Aeronautics, Idaho department of, review of actions of, § 21-120.

Aircraft, jurisdiction of torts committed by or against airman or passenger while in flight over this state, § 21-207.

Airport zoning regulations, appeal to district courts, § 21-506.

Appeals from judgment or order in probate matters, § 17-201.

Awards of industrial commission, decree or judgment to enforce payment, §§ 72-735 to 72-737.

Certiorari, §§ 7-201, 7-202.

Change of name, jurisdiction of district court, § 7-801.

Divorce, exclusive jurisdiction in district court, § 32-715.

Divorce on ground of insanity, jurisdiction of district court, § 32-802.

Election contests, jurisdiction to hear, § 34-2005.

Eminent domain, jurisdiction in district court, § 7-706.

Forcible entry and unlawful detainer, actions for, § 6-305.

Habeas corpus, § 19-4201 et seq.

Industrial commission hearings, power to enforce attendance of witnesses and production of evidence, §§ 72-709, 72-715.

Industrial commission orders and awards, limitation of jurisdiction, § 72-733.

Infraction violation judgments, appeal to district court, Idaho Infraction Rule 15.

Initiative and referendum petition, jurisdiction of judicial proceedings concerning, § 34-1808.

Judges may take proof and acknowledgment of a conveyance of real property or other conveyance, § 1-1903.

Jurisdiction defined by Idaho Const., art. 5, § 20.

Mandamus, § 7-301 et seq.

Prohibition, § 7-401 et seq.

Recall of state officers, jurisdiction of cases involving, § 34-1715.

Safety order of industrial commission, enforcement, jurisdiction, § 72-723.

Effective Dates.

Section 2 of S.L. 1969, ch. 107 provided that the act should be effective at 12:01 A.M. on January 11, 1971.

JUDICIAL DECISIONS

ANALYSIS

Collateral Attack.

A decision of a district court in Idaho that a court in another jurisdiction was without authority to determine a question before it is unassailable in either a state or federal court when collaterally attacked, except for fraud or lack of jurisdiction within the Idaho court. Treinies v. Sunshine Mining Co., 308 U.S. 66, 60 S. Ct. 44, 84 L. Ed. 85 (1939), rehearing denied, 309 U.S. 693, 60 S. Ct. 464, 84 L. Ed. 1034 (1940).

Concurrent Jurisdiction with Federal Courts.

Unless the jurisdiction conferred upon the federal courts is exclusive of the state courts, the latter retain jurisdiction of all actions wherein they are competent to take jurisdiction under their own laws. McCormick v. Smith, 23 Idaho 487, 130 P. 999 (1912).

Jurisdiction in Particular Cases.

The district court had jurisdiction to appoint trustees and receivers for foreign corpo-

ration which owned valuable property in the state and was making contracts and carrying on business in the state when such corporation became insolvent, had creditors and was unable to pay the debts of the corporation since there is no question that such corporation can be sued in the courts of the state and the courts acquire jurisdiction by reason of the fact that such corporation has appointed an agent and a principal place of business located in the state. Rowe v. Stevens, 25 Idaho 237, 137 P. 159 (1913).

A district court has jurisdiction of actions to quiet title to land or to construe and determine rights under a contract to convey, even though the mental capacity of one or more of the parties is drawn in question. Whitney v. Randall, 58 Idaho 49, 70 P.2d 384 (1937).

Idaho court had jurisdiction to determine whether corporate stock was in custody of Washington probate court or had been distributed to Idaho litigants and its judgment was unassailable collaterally. Treinies v. Sunshine Mining Co., 99 F.2d 651 (9th Cir. 1938), aff'd, 308 U.S. 66, 60 S. Ct. 44, 84 L. Ed. 85 (1939), rehearing denied, 309 U.S. 693, 60 S. Ct. 464, 84 L. Ed. 1034 (1940).

District court had jurisdiction to determine custody of minor child whose parents had been divorced in a county other than that in which complaint for custody had been filed, where plaintiff was a resident of the state and personal service had been obtained against defendant within jurisdiction of court, since statutes governing custody of children had not limited original jurisdiction of district court in cases both at law and equity granted by Idaho Const., art. 5, § 20. Clemens v. Kinsley, 72 Idaho 251, 239 P.2d 266 (1951).

District court had jurisdiction of proceeding by taxpayer to contest result of election to determine whether county commissioners should issue bonds to build a hospital based on contention that non-taxpayers were permitted to vote, regardless of whether suit was in equity or in law. Henley v. Elmore County, 72 Idaho 374, 242 P.2d 855 (1952).

The district court in exercising its appellate jurisdiction in probate matters is limited to deciding the issue previously tried in the probate court and presented by the appeal. Muncey v. Children's Home Finding & Aid Soc'y, 84 Idaho 147, 369 P.2d 586 (1962).

Where a purported stipulation included minutes which attempted to resolve issues not as yet presented to the probate court nor embraced within the scope of the question presented on the appeal to the district court, i.e., whether the probate court erred in admitting the will to probate, the order of the trial court must be reversed and the appeal reinstated. Muncey v. Children's Home Finding & Aid Soc'y, 84 Idaho 147, 369 P.2d 586 (1962).

District courts have jurisdiction to quiet title in actions resulting from adverse claims filed in federal patent proceedings. Lewiston Lime Co. v. Barney, 87 Idaho 462, 394 P.2d 323 (1964).

In habeas corpus proceeding in federal district court where state prisoners had filed motions for new trial subsequent to conviction and had appealed to state supreme court where convictions were affirmed and prisoners had not exhausted the remedy of habeas corpus to the state district court, federal court assumed jurisdiction to determine petitions raising only the issues previously presented to the state district and supreme courts on the basis that there had been a practical exhaustion of state remedies and a different result appeared unlikely in the state courts. Drapeau v. May, 350 F. Supp. 1321 (D. Idaho 1972).

Where the subject matter of an action involved alleged proposed unlawful action on the part of the director of insurance which allegedly would cause an insurer irreparable harm, and resolution of the issues raised by the complaint required construction of applicable statutes and determination of the legal effect of a prior administrative decision and order and a prior order of a court of a sister state, the claims presented by the insurer in the district court action involved issues which could be appropriately determined in a declaratory judgment action. Sierra Life Ins. Co. v. Granata, 99 Idaho 624, 586 P.2d 1068 (1978).

The district court had jurisdiction of the surviving spouse's action to establish ownership of a one-half interest in the airplane jointly owned by the decedent and the defendant and to force a sale of the airplane. Olson v. Kirkham, 111 Idaho 34, 720 P.2d 217 (Ct. App. 1986).

District court acquired subject matter jurisdiction over defendant when the state filed the criminal complaint, and although the district court erred in believing it had a valid warrant for defendant's arrest in that no warrant had been issued on April 25, 1994, or at any time thereafter, the district court had no intention of relinquishing jurisdiction and postponed sentence for a proper purpose, to have defendant in custody or amenable to the process of the court. State v. Rogers, 140 Idaho 223, 91 P.3d 1127 (2004).

Res Judicata.

Where an Idaho district court, in passing on the right to stock under a trust agreement, determined that a court in another state did not have jurisdiction to decide the question of the right to the stock, such a holding necessarily determined a question as to the Idaho court's jurisdiction so as to preclude relitigation thereof in another suit or action either in the state or federal court. Treinies v.

Sunshine Mining Co., 308 U.S. 66, 60 S. Ct. 44, 84 L. Ed. 85 (1939), rehearing denied, 309 U.S. 693, 60 S. Ct. 464, 84 L. Ed. 1034 (1940).

Retention of Jurisdiction Exercised.

Where the district court has obtained jurisdiction of an action on a contract, its jurisdiction extends to all issues arising out of or connected with the contract, or relating to or depending upon it, and the defendant may file his cross-complaint, if necessary, to have such issues adjudicated. Murphy v. Russell, 8 Idaho 151, 67 P. 427 (1901).

Order denying defendant's motion for reduction of sentence was upheld where defendant presented no new or additional evidence in support of the motion. The trial court acted within a reasonable time in ruling on the motion and had not lost original jurisdiction when it issued the order denying the motion. State v. Shumway, 144 Idaho 580, 165 P.3d 294 (Ct. App. 2007).

Validity.

The legislature of the territory of Idaho had power to confer on the supreme court of the territory original jurisdiction to issue writs of mandate, review, prohibition, habeas corpus, and all writs necessary to the exercise of its appellate jurisdiction. Clough v. Curtis, 134 U.S. 361, 10 S. Ct. 573, 33 L. Ed. 945 (1890).

Cited in: Spaulding v. Children's Home Finding & Aid Soc'y, 89 Idaho 10, 402 P.2d 52 (1965); Wilson v. State, 90 Idaho 498, 414 P.2d 465 (1966); Glasco v. Brassard, 94 Idaho 162, 483 P.2d 924 (1971); Bonner Bldg. Supply, Inc. v. Standard Forest Prods., Inc., 106 Idaho 682, 682 P.2d 635 (Ct. App. 1984); Daw v. Sch. Dist. 91 Bd. of Trs., 136 Idaho 806, 41 P.3d 234 (2001).

RESEARCH REFERENCES

Am. Jur. — 20 Am. Jur. 2d, Courts, § 56 et seq.

C.J.S. — 21 C.J.S., Courts, § 9 et seq.

A.L.R. — Who is "person acting under" officer of United States or any agency thereof for purposes of availability of right to remove state action to federal court under 28 U.S.C.A. § 1442(a)(1). 166 A.L.R. Fed. 297.

Civil actions removable from state court to federal court under 28 U.S.C.A. § 1443. 159 A.L.R. Fed. 377.

1-706 — 1-710. Terms — Adjournments — Entry of Judgments — Special Terms. [Repealed.]

STATUTORY NOTES

Compiler's Notes.

The following sections were repealed by S.L. 1975, ch. 242, § 1, effective March 31, 1975:

1-706. (C.C.P. 1881, § 27; am. R.C., art. 6; R.S., § 3831; am. 1909, § 1, p. 77; am. 1911, ch. 4, § 2, p. 6; am. 1915, ch. 98, §§ 1, 2, p. 237; compiled and reen. C.L., § 3831; C.S., § 6458; I.C.A., § 1-706; am. 1961, ch. 174, § 1, p. 268).

1-707. (C.C.P. 1881, § 28; R.S., R.C., & C.L., § 3832; C.S., § 6459; I.C.A., § 1-707).

1-708. (C.C.P. 1881, § 29; R.S., § 3833; am. 1889, p. 3, § 1; reen. R.C. & C.L., § 3833; C.S., § 6460; I.C.A., § 1-708).

1-709. (1890-1891, p. 4, § 1; reen. 1899, p. 3, § 1; reen. R.C., § 3834; am. 1911, ch. 4, § 3, p. 6; compiled and reen. C.L., § 3834; C.S., § 6461; I.C.A., § 1-709).

1-710. (1890-1891, p. 4, § 2; reen. 1899, p. 3, § 1; reen. R.C., § 3835; am. 1911, ch. 4, § 4, p. 6; compiled and reen. C.L., § 3835; C.S., § 6462; am. 1927, ch. 4, § 1, p. 9; I.C.A., § 1-710).

1-711. Expenses of district judges. — There shall be paid to each of the judges of the district courts, out of the state treasury, his actual and necessary expenses for subsistence and travel incurred while absent from the city of his resident chambers in attending to and performing his official duties.

History.

R.S., § 6147; am. 1893, p. 66, § 1; reen. 1899, p. 181, § 1; reen. R.C., § 3836; modified by 1915, ch. 98, § 2, p. 237; compiled and reen. C.L., § 3836; C.S., § 6463; am. 1923, ch. 42, § 1, p. 47; I.C.A., § 1-711; am. 1963, ch. 101, § 1, p. 319.

RESEARCH REFERENCES

Am. Jur. — 46 Am. Jur. 2d, Judges, §§ 57 to 60.

1-712. Expenses of district judges — Terms held outside district. [Repealed.]

STATUTORY NOTES

Compiler's Notes.
This section, which comprised R.C., § 3836; 1911, ch. 107, §§ 2, 3, p. 358; modified by 1915, ch. 98, § 2, p. 237; compiled and reen. C.L., § 3836a; C.S., § 6464; I.C.A., § 1-712, was repealed by S.L. 1963, ch. 101, § 2. See § 1-711.

CHAPTER 8

JUDICIAL DISTRICTS

SECTION.

1-801. Number of judicial districts — Number of judges — Resident chambers. — The state is divided into seven (7) judicial districts described in this chapter. The number of district judges for each judicial district shall be as described by this chapter. The resident chambers of a district judge within a judicial district shall be as described in this chapter.

History.
I.C., § 1-801 as reenacted 1967, ch. 51, § 1, p. 95.

STATUTORY NOTES

Prior Laws.
Former chapter 8 which comprised S.L. 1917, ch. 21, §§ 1, 3, 6, p. 50; reen. C.L., ch. 5, §§ 1-11; C.S., §§ 55-64, 64A; am. 1921, ch. 55, §§ 3, 5, 7-10; I.C.A., §§ 1-801 — 1-813; am. 1957, ch. 190, § 1, p. 377; am. 1961, ch. 317, § 1, p. 609; am. 1965, ch. 143, § 1, p. 280 was repealed and reenacted by S.L. 1967, ch. 51, § 1.

1-802. First district — Number of judges — Resident chambers. — (1) The first judicial district shall consist of the counties of Boundary, Bonner, Kootenai, Shoshone and Benewah.

(2) The first judicial district shall have six (6) district judges.

(3) Resident chambers of the district judges of the first judicial district shall be established as follows:

(a) One (1) resident chambers shall be established in Bonner County;

(b) Four (4) resident chambers shall be established in Kootenai County;

(c) One (1) resident chambers shall be established in Shoshone County.

History.

I.C., § 1-802 as reenacted 1967, ch. 51, § 1, p. 95; am. 1979, ch. 223, § 1, p. 618; am. 1997, ch. 66, § 1, p. 141; am. 2006, ch. 266, § 1, p. 827.

STATUTORY NOTES

Prior Laws.

Former § 1-802 was repealed. See Prior Laws, § 1-801.

Amendments.

The 2006 amendment, by ch. 266, in subsection (2), substituted "six (6)" for "five (5)"; and in subsection (3)(b), substituted "Four (4)" for "Three (3)."

Effective Dates.

Section 2 of S.L. 1979, ch. 223 provided that the act should take effect January 1, 1980.

Section 2 of S.L. 1997, ch. 66 provided that the act should be in full force and effect on and after January 1, 1998.

1-803. Second district — Number of judges — Resident chambers. — (1) The second judicial district shall consist of the counties of Latah, Clearwater, Nez Perce, Lewis and Idaho.

(2) The second judicial district shall have four (4) district judges.

(3) Resident chambers of the district judges of the second judicial district shall be established as follows:

(a) One (1) resident chambers shall be established in Latah County;

(b) Two (2) resident chambers shall be established in Nez Perce County;

(c) One (1) resident chambers shall be established in Idaho County.

History.

I.C., § 1-803 as reenacted 1967, ch. 51, § 1, p. 95; am. 1981, ch. 14, § 1, p. 26.

STATUTORY NOTES

Prior Laws.

Former § 1-803 was repealed. See Prior Laws, § 1-801.

Effective Dates.

Section 2 of S.L. 1981, ch. 14 declared an emergency. Approved March 10, 1981.

JUDICIAL DECISIONS

Actual Residence.

District judge, whose resident chambers was in Idaho County, was required pursuant to § 1-809 and this section to actually reside in Idaho County. Although the evidence in the record indicated that the judge had not been actually residing in Idaho County for some time, judge was ordered to take action to comply with the law. Bradbury v. Idaho Judicial Council, — Idaho —, — P.3d —, 2009 Ida. LEXIS 159 (Sept. 10, 2009), cert. denied, — U.S. —, 176 L. Ed. 2d 561 (2010).

1-804. Third district — Number of judges — Resident chambers. — (1) The third judicial district shall consist of the counties of Adams, Washington, Payette, Gem, Canyon and Owyhee.

(2) The third judicial district shall have six (6) district judges.

(3) Resident chambers of the district judges of the third judicial district shall be established as follows:

(a) One (1) resident chambers shall be established in Washington or Payette County.

(b) Five (5) resident chambers shall be established in Canyon County.

History.

I.C., § 1-804 as reenacted 1967, ch. 51, § 1, p. 95; am. 1977, ch. 26, § 1, p. 48; am. 1982, ch. 301, § 1, p. 763; am. 1985, ch. 39, § 1, p. 81; am. 1996, ch. 426, § 1, p. 1453; am. 2006, ch. 266, § 2, p. 827.

STATUTORY NOTES

Prior Laws.

Former § 1-804 was repealed. See Prior Laws, § 1-801.

Amendments.

The 2006 amendment, by ch. 266, in subsection (2), substituted "six (6)" for "five (5)"; and in subsection (3)(b), substituted "Five (5)" for "Four (4)."

Effective Dates.

Section 2 of S.L. 1977, ch. 26 provided that the act should take effect on and after July 1, 1977.

Section 2 of S.L. 1982, ch. 301 declared an emergency. Approved April 1, 1982.

Section 2 of S.L. 1996, ch. 426 provided that the act shall be in full force and effect on January 1, 1997.

1-805. Fourth district — Number of judges — Resident chambers. — (1) The fourth judicial district shall consist of the counties of Valley, Boise, Ada and Elmore.

(2) The fourth judicial district shall have ten (10) district judges.

(3) Resident chambers of the district judges of the fourth judicial district shall be established as follows:

(a) Nine (9) resident chambers shall be established in Ada County;

(b) One (1) resident chambers shall be established in Ada or Elmore County.

History.

I.C., § 1-805 as reenacted 1967, ch. 5, § 1, p. 95; am. 1969, ch. 80, § 1, p. 233; am. 1976, ch. 19, § 1, p. 50; am. 1978, ch. 26, § 1, p. 52; am. 1982, ch. 102, § 1, p. 281; am. 1993, ch. 248, § 1, p. 869; am. 1998, ch. 94, § 1, p. 340; am. 2007, ch. 104, § 1, p. 308.

STATUTORY NOTES

Prior Laws.

Former § 1-805 was repealed. See Prior Laws, § 1-801.

Amendments.

The 2007 amendment, by ch. 104, in subsection (2), substituted "ten (10) district judges" for "nine (9) district judges"; and in subsection (3)(a), substituted "Nine (9) resident chambers" for "Eight (8) resident chambers."

Effective Dates.

Section 2 of S.L. 1976, ch. 19, provided that the act should take effect on and after July 1, 1976.

Section 2 of S.L. 1978, ch. 26 provided that the act should take effect on and after July 1, 1978.

Section 2 of S.L. 1982, ch. 102 provided that the act should take effect January 15, 1983.

Section 4 of S.L. 1993, ch. 248 reads: "Section 2 of this act shall be in full force and effect on and after July 1, 1993. Sections 1 and 3 of this act shall be in full force and effect on and after March 1, 1995."

Section 2 of S.L. 1998, ch. 94 provided this act shall be in full force and effect on and after January 1, 1999.

1-806. Fifth district — Number of judges — Resident chambers. — (1) The fifth judicial district shall consist of the counties of Blaine, Camas, Gooding, Lincoln, Jerome, Minidoka, Cassia and Twin Falls.

(2) The fifth judicial district shall have seven (7) district judges.

(3) Resident chambers of the district judges of the fifth judicial district shall be established as follows:

(a) One (1) resident chambers shall be established in Blaine County;

(b) One (1) resident chambers shall be established in Minidoka County;

(c) Three (3) resident chambers shall be established in Twin Falls County;

(d) One (1) resident chambers shall be established in Cassia County;

(e) One (1) resident chambers shall be established in Gooding or Jerome County.

History.

I.C., § 1-806 as reenacted 1967, ch. 51, § 1, p. 95; am. 1975, ch. 35, § 1, p. 63; am. 1977, ch. 239, § 1, p. 716; am. 1980, ch. 126, § 1, p. 285; am. 1982, ch. 357, § 1, p. 905; am. 1993, ch. 248, § 2, p. 869.

STATUTORY NOTES

Prior Laws.

Former § 1-806 was repealed. See Prior Laws, § 1-801.

Effective Dates.

Section 2 of S.L. 1975, ch. 35 declared an emergency. Approved March 10, 1975.

Section 2 of S.L. 1977, ch. 239 provided that the act should be in full force on and after July 1, 1977.

Section 2 of S.L. 1982, ch. 357 provided that the act should take effect July 1, 1983.

Section 4 of S.L. 1993, ch. 248 read: "Section 2 of this act shall be in full force and effect on and after July 1, 1993. Sections 1 and 3 of this act shall be in full force and effect on and after March 1, 1995."

JUDICIAL DECISIONS

Cited in: Reynolds Constr. Co. v. Twin Falls County, 92 Idaho 61, 437 P.2d 14 (1968).

1-807. Sixth district — Number of judges — Resident chambers. — (1) The sixth judicial district shall consist of the counties of Power, Bannock, Caribou, Bear Lake, Franklin and Oneida.

(2) The sixth judicial district shall have four (4) district judges.

(3) Resident chambers of the district judges of the sixth judicial district shall be established as follows:

(a) One (1) resident chambers shall be established in Caribou County;

(b) Three (3) resident chambers shall be established in Bannock County.

History.

I.C., § 1-807 as reenacted 1967, ch. 51, § 1, p. 95; am. 1980, ch. 315, § 1, p. 807.

STATUTORY NOTES

Prior Laws.

Former § 1-807 was repealed. See Prior Laws, § 1-801.

Effective Dates.

Section 2 of S. L. 1980, ch. 315 provided that the act should take effect on and after January 1, 1981.

1-808. Seventh district — Number of judges — Resident chambers. — (1) The seventh judicial district shall consist of the counties of Lemhi, Custer, Butte, Clark, Fremont, Jefferson, Madison, Teton, Bonneville and Bingham.

(2) The seventh judicial district shall have five (5) district judges.

(3) Resident chambers of the district judges of the seventh judicial district shall be established as follows:

(a) One (1) resident chambers shall be established in Madison County;

(b) One (1) resident chambers shall be established in Bingham County;

(c) Three (3) resident chambers shall be established in Bonneville County.

History.
I.C., § 1-808 as reenacted 1967, ch. 51, § 1, p. 95; am. 1993, ch. 248, § 3, p. 869.

STATUTORY NOTES

Prior Laws.
Former § 1-808 was repealed. See Prior Laws, § 1-801.

Effective Dates.
Section 4 of S.L. 1993, ch. 248 read: "Section 2 of this act shall be in full force and effect on and after July 1, 1993. Sections 1 and 3 of this act shall be in full force and effect on and after March 1, 1995."

1-809. Residence requirement of judges. — District judges shall actually reside at the place designated as resident chambers.

History.
1967, ch. 51, § 2, p. 95.

STATUTORY NOTES

Prior Laws.
Former § 1-809 was repealed. See Prior Laws, § 1-801.

Effective Dates.
Section 3 of S.L. 1967, ch. 51, provided that the act should be in full force and effect from and after July 1, 1967.

JUDICIAL DECISIONS

Actual Residence.
District judge, whose resident chambers was in Idaho County, was required pursuant to § 1-803 and this section to actually reside in Idaho County. Although the evidence in the record indicated that the judge had not been actually residing in Idaho County for some time, judge was ordered to take action to comply with the law. Bradbury v. Idaho Judicial Council, — Idaho —, — P.3d —, 2009 Ida. LEXIS 159 (Sept. 10, 2009), cert. denied, — U.S. —, 176 L. Ed. 2d 561 (2010).

CHAPTER 9

DISTRICT COURT JUDGES — POWERS AT CHAMBERS

1-901 — 1-904. Jurisdiction — Entry of orders — Hearings. [Repealed.]

STATUTORY NOTES

Compiler's Notes.
These sections, which comprised R.S., § 3890; 1905, p. 7, §§ 2-4; am. 1907, p. 317, § 1; reen. R.C. & C.L., §§ 3890-3893; C.S., §§ 6493-6496; I.C.A., §§ 1-901 — 1-904, were repealed by S.L. 1975, ch. 242, § 1, effective March 31, 1975.

1-905. Vacancy in office — Absence or disability of judge — Jurisdiction of other judges. — In case of a vacancy in the office of any district judge, or in his absence from the judicial district or state, or his sickness or inability to act from any cause, motions may be made before, or orders granted by, any other district judge, who shall have the same jurisdiction under this chapter as though he was the judge of said district, and orders, writs and judgments entered by such judge shall be made matters of record as herein directed and have the same effect as though made by the judge of said district.

History.
1905, p. 7, § 5; reen. R.C., § 3894; am. 1911, ch. 206, p. 676; reen. C.L., § 3894; C.S., § 6497; I.C.A., § 1-905.

STATUTORY NOTES

Compiler's Notes.
This section was made a rule of court by order of the supreme court dated March 19, 1951, which order was rescinded by order of the supreme court of October 24, 1974. It may be superseded by Idaho Rules of Civil Procedure, Rule 63.

JUDICIAL DECISIONS

ANALYSIS

Absence or disability of judge.
Application of section.
Death of judge.

Absence or Disability of Judge.
Where the judge of the second judicial district, who was temporarily unable to act on a verified complaint and affidavit filed in said second district for the appointment of a receiver, orally requested the judge of the eighth judicial circuit to act upon said application, the ex parte granting the application by the judge of the eighth circuit, while physically within the confines of the tenth circuit, was valid. Murphy v. McCarty, 69 Idaho 193, 204 P.2d 1014 (1949).

Application of Section.
Under this section, jurisdiction is conferred upon a judge of any other district to same

extent as judge of district for whom he is acting and he is also bound by the same limitations. Callahan v. Dunn, 30 Idaho 225, 164 P. 356 (1917).

This section is applicable to a junior district judge of the same district, as well as to judges from other districts. Ball v. Parma, 49 Idaho 40, 286 P. 24 (1930).

Death of Judge.

Upon the death of a judge, any other judge of the district may carry into effect the execution of a death sentence. State v. Van Vlack, 58 Idaho 248, 71 P.2d 1076 (1937).

1-906. Appeal from chambers orders. [Repealed.]

STATUTORY NOTES

Compiler's Notes.

This section, which comprised 1905, p. 7, § 6; R.C. & C.L., § 3895; C.S., § 6498; I.C.A., § 1-906, was repealed by S.L. 1975, ch. 242, § 1.

1-907. Administrative judge — Administrative powers and duties. — The administrative judge or acting administrative judge in each judicial district, subject to the rules of the Supreme Court, shall have administrative supervision and authority over the operation of the district courts and magistrates in the district. These powers and duties include, but are not limited to, the following:

(a) arranging schedules and assigning district judges for sessions of district courts;

(b) arranging or supervising the calendaring of matters for trial or hearing;

(c) supervising the clerks of the district courts in the discharge of the clerical functions of the district courts;

(d) assigning matters to magistrates, and prescribing times and places at which magistrates shall be available for the performance of their duties;

(e) making arrangements with proper authorities for the drawing of civil jury panels and determining which sessions of the district court shall be jury sessions;

(f) arranging for the reporting of civil cases by court reporters or other authorized means;

(g) arranging sessions, to the extent practicable, for the trial of specialized cases, including traffic, domestic relations, and other types of cases, and assigning district judges to preside over these sessions so as to permit maximum practicable specialization by individual judges;

(h) promulgating a schedule of offenses for which magistrates and clerks of court or other designated persons may accept written appearances, waivers of trial, and pleas of guilty, and establishing a schedule of fines and bails therefor;

(i) assigning magistrates to temporary duty outside the county of their residence, but within the district;

(j) acting as chairman of the district magistrates commission of the district;

(k) assigning to other district judges in the district various powers and duties as in this act provided; and

(*l*) appointing personnel when needed to attend to the courts, and assigning duties to these court attendants for the purpose of maintaining the security and efficiency of court facilities.

History.
1969, ch. 102, § 1, p. 347; am. 1974, ch. 26, § 2, p. 804; am. 1988, ch. 229, § 1, p. 441.

STATUTORY NOTES

Cross References.
District magistrates commission, § 1-2203.

Effective Dates.
Section 2 of S.L. 1969, ch. 102 provided that the act should become effective at 12:01 A.M. on January 11, 1971.

JUDICIAL DECISIONS

ANALYSIS

Administrative judge as judicial officer.
County clerks and bailiffs as state employees.
Deputy court clerk.
Immunity.
Supervision of court clerks.

Administrative Judge as Judicial Officer.
This section, which lists the powers and duties of an administrative judge, does not include contempt powers. However, § 1-1603 provides that "[e]very court has power: ... [t]o compel obedience to its ... orders ...," and § 1-1901 equips each "judicial officer" with similar powers, and although there is no case law as to whether an administrative judge is classified as a judicial officer, it is reasonable to assume that he is. Crooks v. Maynard, 913 F.2d 699 (9th Cir. 1990).

County Clerks and Bailiffs as State Employees.
County court clerk, deputy clerk and bailiffs were state employees for the purpose of imposing liability for the alleged negligent destruction of evidence under the Idaho Tort Claims Act, where an administrative judge of the district court, rather than any county official, was the supervisor and controlled the deputy clerks of the court, evidence officer, and bailiffs while performing their judicial clerical functions in the handling and destruction of exhibits. Blankenship v. Kootenai County, 125 Idaho 101, 867 P.2d 975 (1994).

Deputy Court Clerk.
This section empowered an administrative judge to enter an order which prevented a deputy clerk of the district court from working in the court system or interfering with the functioning of other deputy clerks. Crooks v. Maynard, 718 F. Supp. 1460 (D. Idaho 1989), aff'd, 913 F.2d 699 (9th Cir. 1990).

Immunity.
A district judge who was also serving as an administrative district judge was cloaked in absolute judicial immunity from liability when he jailed a clerk and deputy clerk of court pursuant to a contempt order even though the judge was not in chambers nor were the parties involved in an adversary proceeding; jurisdiction is construed broadly where the issue is the immunity of a judge. Crooks v. Maynard, 913 F.2d 699 (9th Cir. 1990).

Supervision of Court Clerks.
Administrative law judge properly exercised his administrative authority within subdivision (c) of this section in refusing to accept assignment of deputy clerk to perform job assigned by clerk and his action in entering administrative orders that deputy should not perform such assignment was within his power and authority and not subject to restraint through writ of prohibition. Crooks v. Maynard, 112 Idaho 312, 732 P.2d 281 (1987).

Cited in: Long v. Hendricks, 109 Idaho 73, 705 P.2d 78 (Ct. App. 1985).

CHAPTER 10

CLERK OF THE DISTRICT COURT

1-1001. Duties of clerk. — The clerk of the district court must perform such duties as are prescribed in the Code of Civil Procedure and in the Penal Code, and such duties as may be required of him by the rules and practice of the court.

History.
R.S., § 270; compiled and reen. R.C., § 2049; reen. C.L., § 2049; C.S., § 3621; I.C.A., § 1-1001.

STATUTORY NOTES

Cross References.
Bond, § 31-2015.
Clerk to be ex officio auditor and recorder, Idaho Const. art. 18, § 6.
County officers, § 31-2001.
Court seal to be affixed to copies of documents on file in office of clerk, § 1-1616.
Deputies, §§ 31-2003 to 31-2008.
Election, § 34-619.
Exceptions to fee schedule, § 31-3202.
Fees, §§ 31-3201, 31-3201A.
Jury commission, member, § 2-205.
Jury selection, duties regarding, § 2-205 et seq.
Law, practicing or having law partner prohibited, § 31-2014.
Liability for neglect or nonperformance of duties, § 1-1003.
Minute entry of court proceedings, Idaho Civil Procedure Rule 77(b).
Oaths, county officers may administer and certify, § 31-2011.
Office, when open, Idaho Civil Procedure 77(c).
Orders not requiring allowance of court, grantable by clerk, Idaho Civil Procedure Rule 77(c).
Primary elections, § 34-701 et seq.
Qualifications, § 34-619.
Recall elections, § 34-1701 et seq.
Recall elections, duties of clerk of district court, § 34-1706.
Records of clerk, preparation, Idaho Appellate Procedure Rules 27, 28.
Records, preservation or disposition, Idaho Civil Procedure Rule 79(f).
Salary, § 31-3106.

Compiler's Notes.
The Code of Civil Procedure is a division of the Idaho Code consisting of Titles 1 through 13. The Penal Code is a division of the Idaho Code consisting of Titles 18 through 20.

JUDICIAL DECISIONS

Cited in: Crooks v. Maynard, 112 Idaho 312, 732 P.2d 281 (1987).

1-1002. Attendance on court — Deputy must act in clerk's name. — The clerk must in person or by deputy attend every term of the district court held in his county. All acts done and process issued by the deputy must be in the name of his principal.

History.
R.S., § 272; am. R.C. & C.L., § 2050; C.S., § 3622; I.C.A., § 1-1002.

STATUTORY NOTES

Cross References.
Deputies and assistants, §§ 31-2003 — 31-2008.

JUDICIAL DECISIONS

Cited in: Crooks v. Maynard, 112 Idaho 312, 732 P.2d 281 (1987).

1-1003. Liability for neglect or omission. — For any wrongful act or omission to perform any duty imposed by law, by himself or his deputy, the clerk is liable on his official bond to any person injured.

History.
1864, p. 475, § 100; R.S., § 275; reen. R.C. & C.L., § 2051; C.S., § 3623; I.C.A., § 1-1003.

STATUTORY NOTES

Cross References.
Bonds of officers generally, § 31-2015.

JUDICIAL DECISIONS

Cited in: Crooks v. Maynard, 112 Idaho 312, 732 P.2d 281 (1987).

CHAPTER 11

DISTRICT COURT REPORTERS

1-1101. Stenographic reporter — Appointment and qualifications. — There shall be appointed within and for each of the judicial districts of this state, by each district judge, a stenographic reporter who shall be well skilled in the art of stenography and capable of reporting the oral proceedings in court, verbatim.

History.
1890-1891, p. 233, § 1; am. 1895, p. 69, § 1; reen. 1899, p. 163, § 1; reen. R.C., § 3980; am. 1911, ch. 40, § 1, p. 85; reen. C.L., § 3980; C.S., § 6556; I.C.A., § 1-1101.

STATUTORY NOTES

Cross References.
Appeals, preparation of record, fees for, Idaho Appellate Rule 27.

JUDICIAL DECISIONS

Analysis

Accounting for fees.
Death of reporter.
Reporter's notes, court's minutes.

Accounting for Fees.
All fees earned by the reporter or his deputy under the provisions of the reporter statutes, § 1-1101 et seq., must be turned into the state treasury, and the reporter cannot evade that requirement by reducing the stenographic record to narrative form. Keane v. Pittsburg Lead Mining Co., 18 Idaho 711, 112 P. 214 (1910).

Death of Reporter.
Death of court reporter and a showing that his successor could not prepare the transcript was not ground for reversal. State v. Ricks, 34 Idaho 122, 201 P. 827 (1922).

Reporter's Notes, Court's Minutes.
Ordinarily the reporter's notes do not constitute the court's minutes proper, although they are a record of certain proceedings of a trial. First Nat'l Bank v. Poling, 42 Idaho 636, 248 P. 19 (1925).

Cited in: Bumpas v. Moore, 31 Idaho 668, 175 P. 339 (1918); Ebersole v. State, 91 Idaho 630, 428 P.2d 947 (1967); Reynolds Constr. Co. v. Twin Falls County, 92 Idaho 61, 437 P.2d 14 (1968); State v. Salazar, 95 Idaho 305, 507 P.2d 1137 (1973).

RESEARCH REFERENCES

A.L.R. — Court reporter's death or disability prior to transcribing notes as grounds for reversal or new trial. 57 A.L.R.4th 1049.
Failure or refusal of state court judge to have record made of bench conference with counsel in criminal proceeding. 31 A.L.R.5th 704.

1-1102. Oath, bond, salary and expenses — Cost of living adjustments. — (1) Said reporter shall take the oath required to be taken by the judicial officers; and be bonded to the state of Idaho in the form and manner prescribed by chapter 8, title 59, Idaho Code; and hold office during the pleasure of said judge. The salaries of district court reporters shall be paid on regular pay periods not less frequently than monthly as determined by order of the supreme court. The supreme court may, in its discretion, authorize a higher starting salary for any shorthand reporter who has been certified as either a certified shorthand reporter or registered public reporter and who has previous court reporting experience in another state.

(2) The supreme court shall establish and maintain, consistent with the provisions of this section and other applicable provisions of law, a personnel plan for district court reporters governing their appointment, promotion, classification, minimum qualifications, compensation, expenses, leave, transfer, lay-off, removal, discipline and other incidents of employment of those district court reporters. To the extent possible, the personnel plan shall recognize performance as measured by factors such as productivity, reliability, effectiveness and longevity.

(3) There shall be paid in addition to said salary, to each of the court reporters of the district courts, out of the state treasury, for each term of

district court held by the judge thereof, for the trial and disposition of causes and the transaction of business under the laws of the state, in other counties than that in which said court reporter resides, actual and necessary expenses for traveling and attending each term.

History.

1890-1891, p. 233, § 2; am. 1895, p. 69, § 1; reen. 1899, p. 163, § 2; am. 1907, p. 542, § 1; reen. R.C., § 3981; last sentence reenacted in substance 1915, ch. 98, § 2, p. 237; reen. C.L., § 3981; C.S., § 6557; am. 1923, ch. 116, § 1, p. 148; am. 1927, ch. 251, § 1, p. 416; I.C.A., § 1-1102; am. 1945, ch. 64, § 1, p. 82; am. 1949, ch. 255, § 1, p. 515; am. 1953, ch. 16, § 1, p. 34; am. 1953, ch. 86, § 1, p. 117; am. 1957, ch. 315, § 3, p. 673; am. 1961, ch. 324, § 1, p. 616; am. 1965, ch. 181, § 1, p. 379; am. 1967, ch. 355, § 1, p. 1003; am. 1969, ch. 191, § 1, p. 562; am. 1971, ch. 136, § 2, p. 522; am. 1972, ch. 282, § 2, p. 701; am. 1974, ch. 162, § 1, p. 1396; am. 1976, ch. 356, § 1, p. 1172; am. 1977, ch. 178, § 1, p. 459; am. 1978, ch. 185, § 1, p. 417; am. 1980, ch. 131, § 1, p. 290; am. 1985, ch. 173, § 1, p. 455; am. 1989, ch. 319, § 1, p. 826; am. 2008, ch. 33, § 1, p. 65.

STATUTORY NOTES

Cross References.

Bonds of officers generally, § 59-801 et seq.
Oath of office, § 59-401 et seq.

Amendments.

The 2008 amendment, by ch. 33, rewrote the section to remove obsolete language regarding salaries for court reporters and to remove provisions relating to an oath required of court reporters relating to the appropriate order in which to compile transcripts.

Effective Dates.

Section 2 of S.L. 1953, ch. 16 provided the act should be in full force and effect from and after July 1, 1953.

Section 2 of S.L. 1953, ch. 86 provided the act should be in full force and effect from and after July 1, 1953.

Section 4 of S.L. 1957, ch. 315 provided said act should be in full force and effect on and after July 1, 1957.

Section 2 of S.L. 1961, ch. 324 provided the act should be in full force and effect on and after July 1, 1961.

Section 2 of S.L. 1965, ch. 181 provided that the act should be effective on and after July 1, 1965.

Section 2 of S.L. 1967, ch. 355 provided the act should be effective on and after the first day of July, 1967.

Section 2 of S.L. 1969, ch. 191 provided that the act should become effective at 12:01 A.M. on January 11, 1971.

Section 3 of S.L. 1972, ch. 282 provided that the act should be effective on and after July 1, 1972.

Section 2 of S.L. 1974, ch. 162 provided the act should be in full force and effect on and after July 1, 1974.

JUDICIAL DECISIONS

State Official.

The court reporter is a state official, in view of provisions of this section. Sills v. Sills, 51 Idaho 299, 6 P.2d 1026 (1931).

Cited in: Ebersole v. State, 91 Idaho 630, 428 P.2d 947 (1967); Jones v. State Bd. of Medicine, 97 Idaho 859, 555 P.2d 399 (1976).

1-1103. Recording of testimony — Waiver. — The said reporter shall correctly report all oral proceedings had in said court and the testimony taken in all cases tried before said court, except the supreme court, by rule, may designate proceedings and testimony in said court that may be recorded by an electronic device in lieu of stenographic means. The parties may, with the consent of the judge, waive the recording by such reporter of any part of the proceedings or testimony.

History.

1890-1891, p. 233, § 3; reen. 1899, p. 163, § 3; reen. R.C. & C.L., § 3982; C.S., § 6558; I.C.A., § 1-1103; am. 2002, ch. 96, § 1, p. 264.

JUDICIAL DECISIONS

ANALYSIS

Closing Arguments.

Where plaintiffs assigned as grounds for their motion for a new trial certain allegedly improper remarks by defendants' counsel in his closing arguments, but where the reporter's transcript did not contain the closing arguments of counsel to the jury, plaintiffs failed to show prejudicial error, since it was incumbent upon plaintiffs to object to the improper remarks at the time they were made and to request that the reporter record what had transpired. Annau v. Schutte, 96 Idaho 704, 535 P.2d 1095 (1975).

Although the failure of the trial court to require the court reporter to record closing arguments of counsel in a robbery prosecution was error, the error was not in itself a basis for the presumption on appeal that prejudicial error lie hidden in the prosecuting attorney's unrecorded closing argument. State v. Wright, 97 Idaho 229, 542 P.2d 63 (1975).

Court Minutes.

The mandatory requirement of recording all oral proceedings and testimony may be effectuated by stenographic or mechanical recording but court minutes or summaries are insufficient. State v. Wright, 97 Idaho 229, 542 P.2d 63 (1975).

In General.

The receiving of defendant's plea of guilty and sentencing him with no reporter present to take down the proceedings and no clerk present to record the matter was such a lack of fairness and deviation from established rules of procedure as to necessitate the conclusion by the supreme court that the defendant had not been afforded the protection of the due process clauses of the constitutions of the United States and the state. Ebersole v. State, 91 Idaho 630, 428 P.2d 947 (1967); Martinez v. State, 92 Idaho 148, 438 P.2d 893 (1968).

The absence from the record of five or six pages of testimony due to a temporary mechanical failure of the tape recorder being used to record testimony did not invalidate the proceedings of the trial in the absence of a showing by the appellant that proceedings prejudicial to appellant transpired during the period of which no record was made. State v. Polson, 92 Idaho 615, 448 P.2d 229 (1968), cert. denied, 395 U.S. 977, 89 S. Ct. 2129, 23 L. Ed. 2d 765 (1969).

As pre-trial conferences are not required to be recorded by a court reporter, petitioner's counsel was not deficient for not requesting a court reporter be present at a pre-trial conference. Goodwin v. State, 138 Idaho 269, 61 P.3d 626 (Ct. App. 2002).

Interpreters.

Requiring every discussion held between the parties and their counsel or interpreter to be transcribed by a necessarily bilingual court reporter would be impracticable and would unduly interfere with well-established court procedures. Gonzales v. State, 120 Idaho 759, 819 P.2d 1159 (Ct. App. 1991).

Tradition and common sense dictates that "proceedings," when used to define what a court should require as part of the transcript, means the conversations between the judge and the parties, their counsel or their interpreter; therefore, neither this section nor Idaho Criminal Rule 12(g) require transcription of the conversations held at the defense table between the defendant and the interpreter or the defendant and his attorney because these discussions usually are spoken "sotto voce" and are not intended as communications for the court. Gonzales v. State, 120 Idaho 759, 819 P.2d 1159 (Ct. App. 1991).

Mandatory Requirement.

Since the requirement that the reporter correctly report all oral proceedings and testimony is mandatory, a party has no obligation to request a recording nor must he object to a local practice of not recording all proceedings, and it is only on counsel's waiver with consent of the judge that the mandatory requirements may be waived. State v. Wright, 97 Idaho 229, 542 P.2d 63 (1975).

Partial Transcript.

Where a voir dire of potential jurors was held in the judge's chambers to determine whether jurors had viewed or heard about defendant wearing handcuffs as he entered the courtroom, and where the transcript of the official court reporter contained the questions asked, but not the jurors' responses thereto, the defendant could not complain of the failure to include the responses in light of

the fact that the record on appeal contained no motion for an addition to the reporter's transcript to include the responses of the jurors. State v. Youngblood, 117 Idaho 160, 786 P.2d 551 (1990).

Waiver of Recording.

Where defendant's counsel waived recording by court reporter of final arguments, defendant's lack of knowledge of his right to have arguments recorded or of the possible effect of waiving such right did not vitiate that waiver where defendant produced nothing which suggested that counsel acted improperly or for improper reasons in waiving recordation. State v. Stradley, 102 Idaho 41, 624 P.2d 949 (1981).

Cited in: State v. Salazar, 95 Idaho 305, 507 P.2d 1137 (1973); State v. Lovelace, 140 Idaho 73, 90 P.3d 298 (2004).

1-1104. Filing stenographic records and reports. — The reporter shall file the stenographic records and reports made by him with the clerk of the district court of the county in which such report was taken and was tried.

History.

1890-1891, p. 233, § 4; reen. 1899, p. 163, § 4; reen. R.C. & C.L., § 3983; C.S., § 6559; I.C.A., § 1-1104.

JUDICIAL DECISIONS

Cited in: Bumpas v. Moore, 31 Idaho 668, 175 P. 339 (1918); State v. Ricks, 34 Idaho 122, 201 P. 827 (1921); South Boise Water Co. v. McDonald, 50 Idaho 409, 296 P. 591 (1931); Ebersole v. State, 91 Idaho 630, 428 P.2d 947 (1967); Martinez v. State, 92 Idaho 148, 438 P.2d 893 (1968); State v. Salazar, 95 Idaho 305, 507 P.2d 1137 (1973).

1-1105. Copy of record — Effect — Charge for furnishing. — 1. It shall be the duty of each reporter to furnish, upon order of the court entered upon written application being made therefor by any attorney of record in a suit, or any party to a suit, in which a stenographic record has been made, a typewritten copy, or copies, of the record, or any part thereof, upon the payment by such attorney, or party, of the cost thereof, as provided in subsection 2. of this section, to such reporter, which payment shall be retained by the reporter as a part of his compensation and in addition to his salary allowed by section 1-1102, Idaho Code. Said copy, or copies, shall, when properly certified by said reporter, constitute prima facie the minutes of the court, and may be used on all motions for new trials, review or appeal, when the minutes of the court may be used; and the cost of which may, when the same is used on review or appeal, be charged as costs in a civil case against the party finally defeated in the action.

2. That in all actions such reporter shall charge and receive, and retain as provided in subsection 1. of this section, three dollars and twenty-five cents ($3.25) per page for the transcript to be prepared in the style and with the number of copies as directed by rule of the supreme court; provided, however, that when such transcript is requested by a defendant or his attorney on an appeal in a criminal action where after conviction, it appears to the satisfaction of the district court that the accused is poor and unable to procure such transcript, the court must direct payment to such court reporter of the page charge in this subsection provided, from the county treasury.

History.

1890-1891, p. 233, § 5; am. 1895, p. 69, § 1; reen. 1899, p. 163, § 5; am. 1907, p. 542, § 2; reen. R.C. & C.L., § 3984; C.S., § 656D; am. 1925, ch. 111, § 1, p. 157; I.C.A., § 1-1105; am. 1949, ch. 255, § 2, p. 515; am. 1951, ch. 210, § 1, p. 438; am. 1963, ch. 98, § 1, p. 316; am. 1973, ch. 171, § 5, p. 360; am. 1976, ch. 239, § 1, p. 832; am. 1980, ch. 292, § 1, p. 762; am. 1999, ch. 71, § 1, p. 193.

STATUTORY NOTES

Cross References.

Costs, taxation of, § 12-101.

Reporter's transcript, Idaho Appellate Rules 19, 24 to 26, 29.

Effective Dates.

Section 3 of S.L. 1949, ch. 255 provided that the act should be in full force and effect on and after July 1, 1949.

Section 2 of S.L. 1963, ch. 98 declared an emergency. Approved March 13, 1963.

JUDICIAL DECISIONS

Analysis

Conflict Between Transcript and Minutes.

Where there was a patent ambiguity between the reporter's transcript and the clerk's minutes, the court refused to accept the court reporter's transcript as prima facie evidence of the court proceedings. State v. Salazar, 95 Idaho 305, 507 P.2d 1137 (1973).

"Copy" Defined.

The copy contemplated by this section is a literal copy of such record, containing the questions and answers, the objections made, the exceptions taken, etc., and such record reduced to narrative form by the stenographic reporter is not such a copy as the law contemplates. Keane v. Pittsburg Lead Mining Co., 18 Idaho 711, 112 P. 214 (1910).

Effect as Minutes of Court.

Notes of official court reporter do not constitute court minutes proper, and an appeal will not ordinarily lie from a ruling or order orally made and found only in the reporter's transcript. First Nat'l Bank v. Poling, 42 Idaho 636, 248 P. 19 (1926).

This section is intended to refer to the court's rulings on questions of procedure, the admissibility of evidence, motions to elect, motions for nonsuit or directed verdicts, and kindred subjects directly involved in the trial of the cause, and not to final rulings and orders orally announced on collateral issues not directly affecting the trial itself. First Nat'l Bank v. Poling, 42 Idaho 636, 248 P. 19 (1926).

Court reporter's notes are only a part of the minutes of the court, and absence of reporter's notes, or an omission therefrom, cannot be taken to indicate that proceedings not recorded by the reporter were not in fact had. Jackson v. State, 87 Idaho 267, 392 P.2d 695 (1964).

Liability of State for Fees.

Under this section, the state is required to pay the reporter's transcript fee in criminal appeals and civil appeals, and § 67-2301, which exempts the state from the payment of fees, is inapplicable. State v. McDermott, 111 Idaho 52, 720 P.2d 640 (1986).

Motion for New Trial.

Where motion for new trial is not based on the "minutes of the court" but upon the "files, documents and exhibits in the cause and the affidavits to be produced," the court may not resort to the reporter's notes to determine the sufficiency of the evidence to support the verdict. Poitevin v. Randall, 57 Idaho 649, 66 P.2d 1113 (1936).

Taxation of Charges as Costs.

In order to entitle a party to tax fees of a stenographer as costs, it must appear that the services for which the fees were charged were rendered by the court stenographer and incurred under the provisions of this section.

McDonald v. Burke, 3 Idaho 266, 28 P. 440 (1892).

A proceeding before a judge at chambers upon motion to show cause for an injunction is a "suit" in which the prevailing party is entitled to tax the cost of stenographer's fees. Raft River Land & Cattle Co. v. Langford, 6 Idaho 30, 51 P. 1027 (1898).

Under the rules of this court and this section, the statutory fee paid by a party to the reporter for a transcript of the evidence, to be used on motion for a new trial and appeal, may be taxed as costs against the party finally defeated on appeal. Young v. Extension Ditch Co., 14 Idaho 126, 93 P. 772 (1908).

Transcript Prima Facie Correct.

The transcript in any case certified by the reporter shall be deemed prima facie a correct statement of the testimony taken and the proceedings had. State v. Wallace, 116 Idaho 930, 782 P.2d 53 (Ct. App. 1989).

Verity Imputed to Certificate.

Prima facie verity is imputed to reporter's certificate; and this becomes conclusive if no designations of error are timely filed, in which event the certificate is self-sufficient evidence of settlement. Aker v. Aker, 52 Idaho 50, 11 P.2d 372 (1932).

Which Party to Procure.

Either party to a suit, in which a stenographic record has been made, may demand a typewritten copy of a part or the whole thereof. It is not contemplated that each party must procure a transcript of the evidence to prepare his bill, or statement, or amendments thereto; but it does contemplate that the appellant, in the first instance, shall procure such copy and that the respondent may have the benefit thereof. Keane v. Pittsburg Lead Mining Co., 18 Idaho 711, 112 P. 214 (1910).

Cited in: State v. Ricks, 34 Idaho 122, 201 P. 827 (1921); Bassett v. Swenson, 51 Idaho 256, 5 P.2d 722 (1931); Poitevin v. Randall, 57 Idaho 649, 66 P.2d 1113 (1936).

RESEARCH REFERENCES

A.L.R. — Transcript: determination of indigency of accused entitling him to transcript or similar record for purposes of appeal. 66 A.L.R.3d 954; 26 A.L.R.5th 765.

1-1106. Delivery of copy. — It shall be the duty of the reporter to deliver said copy within thirty days after being requested.

History.

1890-1891, p. 233, § 6; reen. 1899, p. 163, § 6; reen. R.C. & C.L., § 3985; C.S., § 6561; I.C.A., § 1-1106.

STATUTORY NOTES

Cross References.

Time for transcript fixed by court order, extension, Idaho Appellate Rule 24.

JUDICIAL DECISIONS

Cited in: State v. Ricks, 34 Idaho 122, 201 P. 827 (1921).

1-1107. Fees to be advanced to clerk. [Repealed.]

STATUTORY NOTES

Compiler's Notes.

This section, which comprised 1890-1891, p. 233, § 7; reen. 1899, p. 163, § 7; reen. R.C. & C.L., § 3986; C.S., § 6562; am. 1931, ch. 216, § 1, p. 421; I.C.A., § 1-1107; am. 1937, ch. 88, § 1, p. 117, was repealed by S.L. 1963, ch. 169, § 3.

1-1108. Deputy and assistants — Appointment, duties and compensation. — When owing to the absence, vacation leave, sickness or other

disability of the regular reporter, or when the business of the court demands it, the court may appoint a substitute or deputy court reporter to act in the place of the regular reporter during such absence, sickness or other disability of the regular reporter. Reporters shall accrue vacation leave and sick leave time and may take vacation leave time or sick leave time in the same manner as other employees of the court.

When in the opinion of the court, or of the judge thereof, the services of one (1) or more persons are required to assist in the making of transcripts of testimony, the court or judge may by order authorize the reporter to employ such persons as may be necessary to facilitate the work in order that transcripts may be prepared without delay. Such assistants shall be entitled to charge and receive for their services in the preparation of transcripts the fees allowed by law therefor, the same to be paid by the reporter from the money received by him for such work.

History.
1899, p. 163; am. 1907, p. 542, § 3; reen. R.C., § 3987; am. 1915, ch. 41, § 1, p. 122; compiled and reen. C.L., § 3987; C.S., § 6563; I.C.A., § 1-1108; am. 1998, ch. 409, § 1, p. 1266.

STATUTORY NOTES

Cross References.
Oath, bond, salary and expenses, § 1-1102.

1-1109. Temporary [deputy] court reporter for retired judge holding court. — Should any retired district judge or justice of the Supreme Court hold district court in any county at the request of the district court thereof, or of the governor, or of the chief justice, and when any such request is made or approved by the chief justice, the administrative judge of the district shall appoint a temporary deputy court reporter for such justice or judge holding district court in compliance with and pursuant to the provisions of section 1-1108, Idaho Code. Such temporary deputy court reporter shall comply with all provisions of chapter 11, title 1, Idaho Code, and shall receive such compensation as is authorized by order of the Supreme Court, together with travel expenses and subsistence expenses incurred while absent from the city of his residence, in accordance with the provisions of "The Standard Travel Pay and Allowance Act of 1949." Compensation shall be paid for the days such temporary deputy court reporter is actually engaged in performance of his duties; such temporary deputy court reporter shall also be entitled to charge and receive for services in the preparation of transcripts only the fees allowed by law therefor.

History.
I.C., § 1-1109, as added by S.L. 1967, ch. 101, p. 210; am. 1974, ch. 26, § 3, p. 804.

STATUTORY NOTES

Compiler's Notes.
The "Standard Travel Pay and Allowance Act of 1949," referred to in this section, is S.L. 1949, ch. 161, compiled as §§ 67-2007, 67-2008.

The bracketed insertion in the section

heading was added by the compiler to reflect the actual contents of the section.

CHAPTER 12
PROBATE COURTS

SECTION.

1-1201 — 1-1205. Probate courts. [Repealed.]

STATUTORY NOTES

Compiler's Notes.

These sections, which comprised C.C.P. 1881, §§ 30-34; R.S., §§ 3840-3844; am. 1907, p. 39, § 1; reen. R.C., §§ 3840-3844; am. 1911, ch. 96, § 1, p. 340; compiled and reen. C.L., §§ 3840-3844; C.S., §§ 6465-6469; I.C.A., §§ 1-1201 — 1-1205; am. 1949, ch. 60, § 1, p. 103; 1965, ch. 167, § 1, p. 328, were repealed by S.L. 1969, ch. 111, § 13.

Sections 1-3 of S.L. 1969, ch. 100 which became effective at 12:01 a.m., January 11, 1971, read:

"SECTION 1. All probate courts, justice of the peace courts, and police courts shall cease to exist on the date as provided in this act. Wherever the words probate court, justice court or police court appear in the Idaho Code they shall mean the district court, or the magistrate's division of the district court, as the case may be, and any power, duty, responsibility, function or jurisdiction of the probate court, justice court or police court shall be transferred to the district court or the magistrate's division of the district court, as the case may be. Wherever the words judge, probate judge, justice of the peace or police judge appear in the Idaho Code they shall mean the district judge or the magistrate of the district court, as the case may be, and any power, duty, responsibility, function or jurisdiction of the probate judge, justice of the peace, or police judge shall be transferred to the district judge or the magistrate of the district court, as the case may be.

"SECTION 2. On the effective date of this act, all cases pending on the docket of the probate court shall be transferred to the docket of the district court for the county and be pending in such court, without affecting any bond or obligation in such cases. On the effective date of this act, all functions, facilities and services of the probate court shall be transferred to the district court for the county and be continued in the district court. Judgments entered by the probate court but not yet satisfied, shall be enforceable in the manner provided by law for district court judgments. Civil and criminal matters pending before each probate court shall be continued in the district courts and be subject thereafter to the provisions of law and rules of procedure applicable in the district courts on the effective date of this act. All records, funds, bonds, or any other items pertaining to the cases or facilities transferred shall be forwarded forthwith by the clerk of the probate court to the clerk of the district court.

"SECTION 3. The records and all cases terminated in the probate courts prior to the effective date of this act shall be placed in the custody of the clerk of the district court, and any proceeding to reopen these cases shall be brought there. The clerk of the district court shall have the power to certify the contents of these records in appropriate cases."

CHAPTER 13
PROBATE JUDGE

SECTION.

1-1301, 1-1302. Probate judge. [Repealed.]

STATUTORY NOTES

Compiler's Notes.

These sections, which comprised R.S., §§ 1835, 1836; reen. R.C. & C.L., §§ 1989, 1990; C.S., §§ 3560, 3561; am. 1921, ch. 214, § 1, p. 426; I.C.A., §§ 1-1301, 1-1302, were repealed by S.L. 1969, ch. 111, § 10.

Section 1 of S.L. 1969, ch. 100 which took effect at 12:01 a.m. on January 11, 1971, read:

"SECTION 1. All probate courts, justice of the peace courts, and police courts shall cease to exist on the date as provided in this act. Wherever the words probate court, justice court or police court appear in the Idaho Code they shall mean the district court, or the magistrate's division of the district court, as the case may be, and any power, duty, responsibility, function or jurisdiction of the probate court, justice court or police court shall be transferred to the district court or the magistrate's division of the district court, as the case may be. Wherever the words judge, probate judge, justice of the peace or police judge appear in the Idaho Code they shall mean the district judge or the magistrate of the district court, as the case may be, and any power, duty, responsibility, function or jurisdiction of the probate judge, justice of the peace, or police judge shall be transferred to the district judge or the magistrate of the district court, as the case may be."

CHAPTER 14

JUSTICES' COURTS

SECTION.

1-1401 — 1-1406. [Repealed.]

1-1401 — 1-1406. Justices' courts. [Repealed.]

STATUTORY NOTES

Compiler's Notes.

These sections, which comprised C.C.P. 1881, §§ 35-39, 56; R.S. & R.C., §§ 3850-3854, 3885; am. 1909, p. 8, § 1; C.L., §§ 3850-3854, 3885; C.S., §§ 6470-6474, 6491; I.C.A., §§ 1-1401 — 1-1406, were repealed by S.L. 1969, ch. 111, § 12.

Sections 1 and 4 of S.L. 1969, ch. 100 which took effect at 12:01 a.m. on January 11, 1971, read:

"SECTION 1. All probate courts, justice of the peace courts, and police courts shall cease to exist on the date as provided in this act. Wherever the words probate court, justice court or police court appear in the Idaho Code they shall mean the district court, or the magistrate's division of the district court, as the case may be, and any power, duty, responsibility, function or jurisdiction of the probate court, justice court or police court shall be transferred to the district court or the magistrate's division of the district court, as the case may be. Wherever the words judge, probate judge, justice of the peace or police judge appear in the Idaho Code they shall mean the district judge or the magistrate of the district court, as the case may be, and any power, duty, responsibility, function or jurisdiction of the probate judge, justice of the peace, or police judge shall be transferred to the district judge or the magistrate of the district court, as the case may be.

"SECTION 4. (1) On the effective date of this act, all dockets and records of each justice of the peace shall be transferred to the district court of the county in which the justice precinct is located. Judgments entered by the justice of the peace, but not yet satisfied, shall be enforceable in the manner provided by law for district court judgments. Civil and criminal matters pending before each justice of the peace shall be continued in the district courts and be subject thereafter to the provisions of law and rules of procedure applicable in the district courts on the effective date of this act.

"(2) On the effective date of this act, all dockets and records of each police judge shall be transferred to the district court of the county in which the city is located. Judgments entered by the police judge, but not yet satisfied shall be enforceable in the manner provided by law for district court judgments. Criminal matters pending before each police judge shall be continued in the district courts and be subject thereafter to the provisions of law and rules of procedure applicable in the district courts on the effective date of this act."

CHAPTER 15

SMALL CLAIMS DEPARTMENT OF JUSTICE'S COURTS

SECTION.
1-1501 — 1-1514. [Repealed.]

1-1501 — 1-1514. Small claims department of justice's courts. [Repealed.]

STATUTORY NOTES

Compiler's Notes.

These sections, which comprised S.L. 1923, ch. 177, §§ 1-14, p. 272; I.C.A., §§ 1-1501 — 1-1514; am. 1945, ch. 25, § 1, p. 32; am. 1951, ch. 40, § 1, p. 50; am. 1951, ch. 56, § 1, p. 83; am. 1953, ch. 50, § 1, p. 68; am. Order of Court, June 19, 1961; am. 1969, ch. 151, § 1, p. 477; am. 1969, ch. 169, § 1, p. 504; am. 1969, ch. 241, § 1, p. 757, were repealed by S.L. 1969, ch. 111, § 19.

For present law, see § 1-2301 et seq.

CHAPTER 16

MISCELLANEOUS PROVISIONS

SECTION.
1-1601, 1-1602. [Repealed.]
1-1603. Powers of court.
1-1604, 1-1605. [Repealed.]
1-1606. Courts — Days when held.
1-1607. Nonjudicial days.
1-1608 — 1-1612. [Repealed.]
1-1613. Facilities and equipment provided by county.
1-1613A. County employees performing functions of the district court under court control — Liability.
1-1614. Courts having seals.
1-1615. Clerk must keep seal.
1-1616. Instruments requiring seal of court.
1-1617 — 1-1621. [Repealed.]
1-1622. Incidental means to exercise jurisdiction.
1-1623. Idaho statewide trial court automated records system (ISTARS) technology fund.
1-1624. Set-off procedure for delinquent debts owed to the courts.
1-1625. Drug court, mental health court and family court services fund.

1-1601, 1-1602. Sittings public — Exceptions — Exclusions. [Repealed.]

STATUTORY NOTES

Compiler's Notes.

These sections, which comprised C.C.P. 1881, §§ 40, 41; R.S., R.C., & C.L., §§ 3860, 3861; C.S., §§ 6475, 6476; I.C.A., §§ 1-1601, 1-1602, were repealed by S.L. 1975, ch. 242, § 1, effective March 31, 1975. For present rule see Idaho Civil Procedure Rule 77(b).

1-1603. Powers of court. — Every court has power:

1. To preserve and enforce order in its immediate presence.

2. To enforce order in the proceedings before it or before a person or persons empowered to conduct a judicial investigation under its authority.

3. To provide for the orderly conduct of proceedings before it or its officers.

4. To compel obedience to its judgments, orders and process, and to the orders of a judge out of court in an action or proceeding pending therein.

5. To control, in furtherance of justice, the conduct of its ministerial officers, and of all other persons in any manner connected with a judicial proceeding before it, in every matter appertaining thereto.

6. To compel the attendance of persons to testify in an action or proceeding pending therein, in the cases and manner provided in this code.

7. To administer oaths in an action or proceeding pending therein, and in all other cases where it may be necessary in the exercise of its powers and duties.

8. To amend and control its process and orders, so as to make them conformable to law and justice.

History.
C.C.P. 1881, § 42; R.S., R.C., & C.L., § 3862; C.S., § 6477; I.C.A., § 1-1603.

STATUTORY NOTES

Cross References.
Contempt proceedings, § 7-601 et seq.
Oaths of officers generally, § 59-401 et seq.
Similar powers of judicial officers, § 1-1901.
View of premises or property by jury, Idaho Civil Procedure Rule 43(f).

JUDICIAL DECISIONS

Analysis

Action of the judge on misconduct of others.
Administrative judge as judicial officer.
Amendment and control of orders.
Amendment and control of process.
Construction.
Contempt power.
Correction of records.
Dismissal of proceeding.
Immunity.
Imposition of lien.

Action of the Judge on Misconduct of Others.

It is within the power of the judge to administer an admonition or deliver a rebuke to a counsel, party, bystander, or witness for misconduct or improprieties, and the course of the judge therein rests largely in his sound discretion. It is a dangerous practice to order the arrest of a witness or party for perjury during the trial and in the presence of the jury, as it will generally work a reversal. So, too, the trial judge should be careful even in administering a rebuke and not permit it to take on the aspect of severity; the danger of such rebuke is that it might prejudice the jury against the party who had called the witness. State v. Clark, 27 Idaho 48, 146 P. 1107 (1915).

An assignment claiming prejudicial error for an outcry, "You lie!" by the wife of the complaining witness, while accused was testifying, was held not reviewable, where no request was made to have the jury instructed relative to the incident, nor to have the wife reprimanded, and no exception was taken. State v. Cox, 55 Idaho 694, 46 P.2d 1093 (1935).

Administrative Judge as Judicial Officer.

Section 1-907, which lists the powers and duties of an administrative judge, does not include contempt powers. However, this section provides that "[e]very court has power: ... [t]o compel obedience to its ... orders ...," and § 1-1901 equips each "judicial officer" with similar powers; although there is no case law as to whether an administrative judge is classified as a judicial officer, it is reasonable to assume that he is. Crooks v. Maynard, 913 F.2d 699 (9th Cir. 1990).

Amendment and Control of Orders.

This section does not authorize a motion for a new trial in the supreme court in an original proceeding instituted in and disposed of by

that court. People ex rel. Lincoln County v. George, 3 Idaho 108, 27 P. 680 (1891).

Where the probate court, by inadvertence, confirms a sale of real estate to the wrong person, it may subsequently vacate the order of confirmance and enter a proper order. State ex rel. Chemung Mining Co. v. Cunningham, 6 Idaho 113, 53 P. 451 (1898).

Trial court in granting a rehearing on a prior order must protect legitimate rights acquired under the prior order. J.I. Case Co. v. McDonald, 76 Idaho 223, 280 P.2d 1070 (1955).

Trial court, before the time for appeal from order dissolving attachment had expired, was entitled to reconsider its order and grant a rehearing. J.I. Case Co. v. McDonald, 76 Idaho 223, 280 P.2d 1070 (1955).

Amendment and Control of Process.

The court may quash an execution issued without authority of law after the taking of an appeal and filing of a supersedeas bond. Miller v. Pine Mining Co., 3 Idaho 603, 32 P. 207 (1893).

The court may order a summons withdrawn from the files and served after it has become a file of the court. Harpold v. Doyle, 16 Idaho 671, 102 P. 158 (1908).

The court may order a defective summons so amended as to conform to the requirements of the statute and, after amendment, may order it withdrawn from the files and served. Ridenbaugh v. Sandlin, 14 Idaho 472, 94 P. 827 (1908); Empire Mill Co. v. District Court, 27 Idaho 383, 149 P. 499, writ denied, 27 Idaho 400, 149 P. 505 (1915).

Construction.

Where a statute authorizes a court to modify its orders, such a statute should be liberally construed. J.I. Case Co. v. McDonald, 76 Idaho 223, 280 P.2d 1070 (1955).

Contempt Power.

While Title 7, chapter 6, Idaho Code, provides statutory guidance with respect to contempts, it may not constitutionally circumscribe the judicial power conferred by Idaho Const., art. 5, § 2, the power recognized by this section or the inherent common-law contempt power. Marks v. Vehlow, 105 Idaho 560, 671 P.2d 473 (1983).

Section 7-611, governing contempt by omission, does not preclude alternative civil sanctions under the common law or this section; in such instances, the coercive force may be implemented by means of prospective conditional fines. Marks v. Vehlow, 105 Idaho 560, 671 P.2d 473 (1983).

Where the primary purpose of the contempt order against defendant, entered after she pled guilty to driving under the influence, was to coerce compliance with the court's order, the contempt order was a civil contempt order and no statute of limitations applied. State v. Schorzman, 129 Idaho 313, 924 P.2d 214 (1996).

Bail bondsman's contractual obligation to pay forfeited bond was a civil liability enforceable by the prosecuting attorney in a separate civil action, and district court was without authority to enforce payment of the bond forfeiture under the penalty of contempt. State v. Rocha, 131 Idaho 113, 952 P.2d 1249 (Ct. App. 1998).

Warrants of attachment arise from the contempt power of the court. State v. Hall, 132 Idaho 751, 979 P.2d 624 (1999).

In a dispute over an access easement, the district court did not abuse its discretion by entering an injunction against appellant for contempt because the district court simply ordered the parties to continue abiding by the terms of the stipulated judgment — terms to which they were already bound. That action clearly fell within the judge's authority to compel obedience. Steiner v. Gilbert, 144 Idaho 240, 159 P.3d 877 (2007).

Correction of Records.

Courts of record always have jurisdiction over their own records to make them conform to the facts. State v. Winter, 24 Idaho 749, 135 P. 739 (1913).

Every court of record has inherent power to correct its records, so that such records will correctly show orders and directions which were made by court, and this power is not lost by lapse of time. State v. Douglass, 35 Idaho 140, 208 P. 236 (1920); Hample v. McKinney, 48 Idaho 221, 281 P. 1 (1929).

Power to correct records of court extends to criminal as well as civil cases. State v. Douglass, 35 Idaho 140, 208 P. 236 (1922).

The court cannot, under the form of amendment of its records, correct a judicial error or make of record an order or judgment that was in fact never given. State v. Douglass, 35 Idaho 140, 208 P. 236 (1922).

In exercise of power of correction of records, a court is not authorized to do more than make records correspond to actual facts. State v. Douglass, 35 Idaho 140, 208 P. 236 (1922).

Where, through mistake, there has been a failure to enter the judgment pronounced, the court has power to correct the matter and to order the proper entry made. Clerical mistakes may be corrected in this way, but judicial errors may only be remedied by motion for new trial or by appeal. Occidental Life Ins. Co. v. Niendorf, 55 Idaho 521, 44 P.2d 1099 (1935).

On a mortgage foreclosure, where the decree was defective as first entered in not naming the defendant personally liable for payment of the mortgage debt, the same may be amended at any time by adding a clause designating the defendant personally liable,

where the record clearly shows who he is. Donaldson v. Henry, 63 Idaho 467, 121 P.2d 445 (1941).

Record disclosing transferee assumed and promised to pay mortgage debt authorized an amendment of decree of foreclosure. Donaldson v. Henry, 63 Idaho 467, 121 P.2d 445 (1941).

The power of a court to amend its record is limited to making such records correspond to actual facts, but it cannot, under the form of amending its records, correct judicial errors or make of record an order or judgment not in fact given. Donaldson v. Henry, 63 Idaho 467, 121 P.2d 445 (1941).

Record disclosing liability of husband mortgagor authorized an amendment of the foreclosure decree. Donaldson v. Henry, 63 Idaho 467, 121 P.2d 445 (1941).

Dismissal of Proceeding.

Dismissal of proceeding is an appropriate means of enforcing order of court. Perry v. Perkins, 73 Idaho 4, 245 P.2d 405 (1952).

Immunity.

A district judge who was also serving as an administrative district judge was cloaked in absolute judicial immunity from liability when he jailed a clerk and deputy clerk of court pursuant to a contempt order even though the judge was not in chambers nor were the parties involved in an adversary proceeding; jurisdiction is construed broadly where the issue is the immunity of a judge. Crooks v. Maynard, 913 F.2d 699 (9th Cir. 1990).

Imposition of Lien.

A district court's imposition of a "lien" upon a mining partnership's machinery and claims in order to secure the costs of preparing a land restoration plan and contingent restoration costs was an action which, in effect, replaced the security ordinarily assured by the statutory bond required by § 47-1317 and was within the inherent power of the court under this section to insure compliance not only with the intent of the statute but also with its own related orders. State ex rel. Evans v. Click, 102 Idaho 443, 631 P.2d 614 (1981), cert. denied, 457 U.S. 1116, 102 S. Ct. 2927, 73 L. Ed. 2d 1328 (1982).

Cited in: Crooks v. Maynard, 851 F.2d 1562 (9th Cir. 1988); Smith v. Smith, 136 Idaho 120, 29 P.3d 956 (Ct. App. 2001).

RESEARCH REFERENCES

Am. Jur. — 20 Am. Jur. 2d, Courts, §§ 32 to 38 and 68 to 80.

46 Am. Jur. 2d, Judgments, § 130 et seq.

C.J.S. — 17 C.J.S., Contempt, § 1 et seq.

21 C.J.S., Courts, § 274 et seq.

A.L.R. — Publication or broadcast, during course of trial, of matter prejudicial to criminal defendant as contempt. 33 A.L.R.3d 1116.

Disqualification of judge in proceedings to punish contempt against or involving himself or court of which he is a member. 37 A.L.R.4th 1004.

Construction of provision in federal criminal procedure rule 42(b) that if contempt charges involve disrespect to or criticism of judge, he is disqualified from presiding at trial or hearing except with defendant's consent. 3 A.L.R. Fed. 420.

1-1604, 1-1605. Making rules. [Repealed.]

STATUTORY NOTES

Compiler's Notes.

These sections, which comprised C.C.P. 1881, §§ 43, 44; R.S., R.C., & C.L., §§ 3863, 3864; C.S., §§ 6478, 6479; I.C.A., §§ 1-1604, 1-1605, were repealed by S.L. 1975, ch. 242, § 1, effective March 31, 1975. For present rule, see Idaho Civil Procedure Rule 1(c).

1-1606. Courts — Days when held. — The courts of justice may be held and judicial business be transacted on any day except as provided in the next section.

History.

C.C.P. 1881, § 45; R.S., R.C., & C.L., § 3865; C.S., § 6480; I.C.A., § 1-1606.

1-1607. Nonjudicial days. — No court can be opened nor can any judicial business be transacted on any day enumerated in section 73-108,

Idaho Code, or on every day appointed by the President of the United States, or by the governor of this state, for a public fast, thanksgiving, or holiday, or on a day on which the general election is held, except for the following purposes:

1. To give, upon their request, instructions to a jury when deliberating on their verdict.

2. To receive a verdict or discharge a jury.

3. For the exercise of the powers of a magistrate in a criminal action or in a proceeding of a criminal nature: provided, that in civil causes orders of arrest may be made and executed; writs of attachment, executions, injunctions and writs of prohibition may be issued and served; proceedings to recover possession of personal property may be had; and suits for the purpose of obtaining any such writs and proceedings may be instituted on any day.

History.
C.C.P. 1881, § 46; R.S., R.C., & C.L., § 3866; C.S., § 6481; I.C.A., § 1-1607; am. 1961, ch. 270, § 1, p. 480; am. 1971, ch. 84, § 1, p. 186.

STATUTORY NOTES

Cross References.
Legal holidays, § 73-108.

Effective Dates.
Section 2 of S.L. 1971, ch. 84 declared an emergency. Approved March 8, 1971.

JUDICIAL DECISIONS

ANALYSIS

Execution sales.
Particular acts permitted.

Execution Sales.
An execution sale is a ministerial act, rather than "judicial business" as that term is used in this section, and execution sales conducted on holidays are valid. Ketterer v. Billings, 106 Idaho 832, 683 P.2d 868 (1984).

Particular Acts Permitted.
The statute prohibits judicial but not ministerial acts on a non-judicial day; consequently, the issuance of letters of administration on Christmas is not a void act where the appointment is made on another day. Glendenning v. McNutt, 1 Idaho 592 (1875).

The filing of a complaint on Sunday and the issuance of a summons thereon is a ministerial act and is not prohibited by this section, although the action is not one in which an order of arrest or writ of attachment, injunction or prohibition is sought. Havens v. Stiles, 8 Idaho 250, 67 P. 919 (1902).

An objection to the panel of a jury in a criminal prosecution on the ground that some of the jurors were summoned under a special venire on Sunday was properly overruled. State v. Gilbert, 8 Idaho 346, 69 P. 62 (1902).

1-1608 — 1-1611. Adjournments. [Repealed.]

STATUTORY NOTES

Compiler's Notes.
These sections, which comprised C.C.P. 1881, §§ 47-50; R.S., R.C., & C.L., §§ 3867-3870; C.S., §§ 6482-6485; I.C.A., §§ 1-1608 — 1-1611, were repealed by S.L. 1975, ch. 242, § 1, effective March 31, 1975. For present rule, see Idaho Civil Procedure Rule 77(a).

1-1612. Persons must appear at appointed place. [Repealed.]

STATUTORY NOTES

Compiler's Notes.
This section, which comprised C.C.P. 1881, § 51; R.S., R.C., & C.L., § 3871; C.S., § 6486; I.C.A., § 1-1612, was repealed by S.L. 2006, ch. 142, § 1.

1-1613. Facilities and equipment provided by county. — Each county in the state shall provide suitable and adequate facilities for the district court, including the facilities and equipment necessary to make the space provided functional for its intended use, and shall provide for the staff, personnel, supplies, and other expenses of the district court.

History.
I.C., § 1-1613, as added by 1976, ch. 133, § 2, p. 501.

STATUTORY NOTES

Prior Laws.
Former § 1-1613, which comprised C.C.P. 1881, § 52; R.S., R.C., & C.L., § 3872; C.S., § 6487; I.C.A., § 1-1613, was repealed by S.L. 1976, ch. 133, § 1.

1-1613A. County employees performing functions of the district court under court control — Liability. — (1) For the purposes of the Idaho tort claims act, as set forth in sections 6-901 et seq., Idaho Code, any county official or employee, including any elected or appointed county official, while acting in the course and scope of performing clerical, judicial and other administrative functions and duties of the district court, shall be considered an employee of the state of Idaho.

(2) For the purposes of this section only, the term "district court" includes all district courts and magistrates divisions thereof, administrative judges of each district, and all district and magistrate judges in the judicial districts of the state of Idaho.

History.
I.C., § 1-1613A, as added by 2005, ch. 221, § 1, p. 698.

1-1614. Courts having seals. — Each of the following courts has a seal:

1. The Supreme Court.
2. The district courts.
3. The magistrate's division of the district courts.

History.
C.C.P. 1881, § 53; R.S., R.C., & C.L., § 3873; C.S., § 6488; I.C.A., § 1-1614; am. 1969, ch. 105, § 1, p. 360.

STATUTORY NOTES

Effective Dates.
Section 2 of S.L. 1969, ch. 105 provided that the act should be effective at 12:01 A.M. on January 11, 1971.

1-1615. Clerk must keep seal. — The clerk of the court must keep the seal thereof.

History.
C.C.P. 1881, § 54; R.S., R.C., & C.L., § 3874; C.S., § 6489; I.C.A., § 1-1615.

1-1616. Instruments requiring seal of court. — The seal of the court need not be affixed to any proceeding therein, or document except:

1. To a writ.

2. To the certificate of the probate of a will, or of the appointment of an executor, administrator or guardian.

3. To the authentication of a copy of a record or other proceeding of a court, or of an officer thereof, or of a copy of a document on file in the office of the clerk.

History.
C.C.P. 1881, § 55; R.S., R.C., & C.L., § 3875; C.S., § 6490; I.C.A., § 1-1616.

JUDICIAL DECISIONS

ANALYSIS

Effect of omission of seal.
Habeas corpus.

Effect of Omission of Seal.
The omission of the seal of the court on a writ or process is not fatal. It is a mere irregularity and does not render the process void. Harpold v. Doyle, 16 Idaho 671, 102 P. 158 (1908).

Habeas Corpus.
An order for the temporary care pending the hearing of the person whose custody is the subject of a writ of habeas corpus need not be issued and signed by the clerk under the seal of the court. In re Dowling, 4 Idaho 715, 43 P. 871 (1896).

1-1617, 1-1618. Successive applications for orders. [Repealed.]

STATUTORY NOTES

Compiler's Notes.
These sections, which comprised C.C.P. 1881, §§ 67, 68; R.S., R.C., & C.L., §§ 3920, 3921; C.S., §§ 6506, 6507; I.C.A., §§ 1-1617, 1-1618, were repealed by S.L. 1975, ch. 242, § 1, effective March 31, 1975. For present rule, see Idaho Civil Procedure Rule 11(a)(2).

1-1619. Proceedings not affected by vacancy. [Repealed.]

STATUTORY NOTES

Compiler's Notes.
This section, which comprised C.C.P. 1881, § 69; R.S., R.C., & C.L., § 3933; C.S., § 6508; I.C.A., § 1-1619, was repealed by S.L. 1975, ch. 242, § 1, effective March 31, 1975.

1-1620, 1-1621. Proceedings to be in English — Abbreviations and numbers. [Repealed.]

STATUTORY NOTES

Compiler's Notes.
These sections, which comprised C.C.P. 1881, §§ 70, 71; R.S., R.C., & C.L., §§ 3923, 3924; C.S., §§ 6509, 6510; I.C.A., §§ 1-1620, 1-1621, were repealed by S.L. 1975, ch. 242, § 1. For present rule see, Idaho Civil Procedure Rule 10(a)(3).

1-1622. Incidental means to exercise jurisdiction. — When jurisdiction is, by this code, or by any other statute, conferred on a court or judicial officer all the means necessary to carry it into effect are also given; and in the exercise of the jurisdiction if the course of proceedings be not specially pointed out by this code, or the statute, any suitable process or mode of proceeding may be adopted which may appear most conformable to the spirit of this code.

History.
C.C.P. 1881, § 72; R.S., R.C., & C.L., § 3925; C.S., § 6511; I.C.A., § 1-1622.

STATUTORY NOTES

Compiler's Notes.
The words "this code" refer to the Code of Civil Procedure, which is currently a division of the Idaho Code consisting of Titles 1 through 13.

JUDICIAL DECISIONS

Analysis

Adoption.
Alimony.
Appellate practice.
Completeness of jurisdiction.
Contempt.
Criminal procedure.
Custody of children on divorce.
Custody of children on habeas corpus.
Dismissal of proceeding.
Inherent power.
Physical examination of plaintiff.
Powers of substitute judge.
Property settlement.
Quo warranto proceedings.
Recall of remittitur.
Specific performance.
Supreme court drafting procedure.
Trespass of animals.
Writ of assistance.

Adoption.
This section, which requires the court to adopt any suitable process or mode of process which appears most comfortable to the spirit of the code, is not applicable to permit the court to establish the procedure for adult adoption, for this is an area which is entirely statutory and should be established by the legislature. Melling v. Chaney, 126 Idaho 554, 887 P.2d 1061 (1994).

Alimony.
Where the court had jurisdiction of both the parties and the subject matter, an order au-

thorizing the withholding of payments to divorced wife under an alimony contract made part of the decree of divorce was not void for want of jurisdiction, however irregular or erroneous such order might be. McDonald v. McDonald, 55 Idaho 102, 39 P.2d 293 (1934).

Where divorce decree did not award alimony and became final by operation of law, no appeal having been taken and the time for modification or amendment having expired, district court was without jurisdiction to entertain petition for modification of divorce decree. McDonald v. McDonald, 56 Idaho 444, 55 P.2d 827 (1936).

Appellate Practice.

This section does not authorize the court to require an undertaking on appeal additional to the one required by statute applicable to the given case. Barnes v. Buffalo Pitts Co., 6 Idaho 519, 57 P. 267 (1899).

The district court, upon the reversal of a judgment on appeal from a probate or justice's court on question of law alone, where no issue of fact was tendered in the lower court, should remand the cause with instructions to proceed in accordance with the decision and judgment of the district court. Smith v. Clyne, 15 Idaho 254, 97 P. 40 (1908).

Completeness of Jurisdiction.

When jurisdiction is conferred upon a court, as an incident of such grant, there is conferred the power to make same effective by suitable process or mode of procedure. Fox v. Flynn, 27 Idaho 580, 150 P. 44 (1915).

When the court has jurisdiction of subject matter and parties, it may hear and determine all questions essential to a decision on the merits and issue such writs as may be necessary to carry its decree into effect. McDonald v. McDonald, 55 Idaho 102, 39 P.2d 293 (1934).

In the exercise of its inherent judicial power, the court may use the common law or other appropriate method if the statute or rule does not describe the procedure. J.I. Case Co. v. McDonald, 76 Idaho 223, 280 P.2d 1070 (1955).

Contempt.

Although the proper remedy of one adjudged in contempt of court is by extraordinary writ and not by appeal, the supreme court, where the appeal was not challenged by the respondent, had jurisdiction to consider and resolve the appeal on its merits. Jones v. Jones, 91 Idaho 578, 428 P.2d 497 (1967).

Criminal Procedure.

Absent legislative direction, the supreme court not only has the authority, but the duty, to adopt procedures designed to safeguard the rights of an accused to a fair and impartial trial. State v. Johnson, 86 Idaho 51, 383 P.2d 326 (1963).

Custody of Children on Divorce.

As there is no statutory procedure prescribed for vacating or modifying a decree awarding custody of children on divorce, this section is applicable. Cornelison v. Cornelison, 53 Idaho 266, 23 P.2d 252 (1933).

Custody of Children on Habeas Corpus.

A temporary order, providing for the custody of a child pending habeas corpus proceedings in relation to the same, may be issued at chambers and without the seal of the court. In re Miller, 4 Idaho 711, 43 P. 870 (1896); In re Dowling, 4 Idaho 715, 43 P. 871 (1896).

In habeas corpus proceedings for custody of a child, the court may issue an order nisi requiring the child to be committed to the custody of the applicant until the hearing, where the facts show that the health of the child is endangered in its present environment and that it is also dangerous, in view of the inclemency of the season or other conditions, to bring the child before the court for immediate hearing. In re Miller, 4 Idaho 711, 43 P. 870 (1896).

Dismissal of Proceeding.

Dismissal of proceeding is an appropriate means of enforcing order of court. Perry v. Perkins, 73 Idaho 4, 245 P.2d 405 (1952).

Inherent Power.

Although a proceeding brought by a city to set aside an order issued pursuant to § 1-2218, which obligated the city to provde facilities for a magistrate division of the district court, was not truly a civil action, the district judges have an inherent power, codified in this section, to consider the standards in Idaho R. Civ. P. 24(a) and allow a county which would be adversely affected by the set aside, to intervene. City of Boise v. Ada County (In re Facilities & Equip. Provided by the City of Boise), 147 Idaho 794, 215 P.3d 514 (2009).

Physical Examination of Plaintiff.

A court has power to order physical examination of plaintiff, and, where plaintiff refuses to submit thereto, the court also has power to dismiss the plaintiff's case. Greenhow v. Whitehead's, Inc., 67 Idaho 262, 175 P.2d 1007 (1946).

It was abuse of discretion for court to order plaintiff to submit to physical examination on the same day of entry of order, precluding plaintiff the opportunity to have her own physician present. Greenhow v. Whitehead's, Inc., 67 Idaho 262, 175 P.2d 1007 (1946).

In ordering physical examination, court must give due regard to plaintiff's health, time and place, and, though requiring prompt compliance, the order should be reasonable as to all parties, permitting plaintiff to have

present such reasonable number of attendants as she may desire. Greenhow v. Whitehead's, Inc., 67 Idaho 262, 175 P.2d 1007 (1946).

Powers of Substitute Judge.

A judge of one district, called into another district to try a case pending in that district, has all the powers of the judge of that district for the purposes of the case and may make an order extending the time for preparing and presenting statements and bills of exceptions, or for filing affidavits on motion for new trial. Morris v. Lemp, 13 Idaho 116, 88 P. 761 (1907).

Property Settlement.

Where husband resided in California and a contempt process had no effect upon him, Idaho magistrate, who issued divorce decree, properly exercised continuing jurisdiction by ordering the Air Force Accounting Center to make monthly payments from former husband's military retirement fund to former wife to make up for arrearages in payments promised in a property settlement for wife's release of her community interest in those benefits. Ratkowski v. Ratkowski, 115 Idaho 692, 769 P.2d 569 (1989).

Quo Warranto Proceedings.

Where, notwithstanding a judgment of ouster in quo warranto proceedings, the person ousted takes possession of the office in open and direct violation of the judgment, the court may issue an order putting the person declared by the judgment entitled to the office in possession thereof. People v. Lindsay, 1 Idaho 394 (1871).

Recall of Remittitur.

Where court has determined a question not properly before it and entered a finding thereon in its judgment, it may recall its remittitur for purpose of correcting its judgment and limiting same to a decision of question presented. Maloney v. Zipf, 41 Idaho 30, 237 P. 632 (1925).

Specific Performance.

Court was empowered to order clerk to make deed to purchaser complying with contract for sale of property. Glancy v. Williams, 50 Idaho 109, 293 P. 665 (1930).

Supreme Court Drafting Procedure.

Supreme court has authority to draft its own procedure in entertaining jurisdiction of petition attacking validity of short title assigned to initiative measure. In re Idaho State Fed'n of Labor, 75 Idaho 367, 272 P.2d 707 (1955).

Trespass of Animals.

In pursuance of the authority of this statute and the right of action conferred by former law regarding limitations on herding sheep, it is proper for a justice's court to proceed under the provisions of former law regarding the trespass of animals in a case where it is charged that the owner of trespassing sheep is unknown to the plaintiff, and that he is unable to ascertain the name of the owner, and the animals are taken into the possession of the plaintiff in the action and subsequently delivered to the officer who levies upon them under the execution issued by the justice. Cleveland v. Wallace, 23 Idaho 570, 131 P. 10 (1913).

Writ of Assistance.

Writ of assistance, a process issued out of a court of equity to transfer possession of land, the title to which has been adjudicated, is the proper remedy to place purchaser of mortgaged premises in possession; the power to issue the writ in this state is not derived from any statute but from the practice which obtained at common law. Eagle Rock Corp. v. Idamont Hotel Co., 60 Idaho 639, 95 P.2d 838 (1939).

Upon application for writ of assistance, no question determined by the original decree can be litigated nor can the original case be reviewed and the sole question is the applicant's right, as against the party in possession, to use the writ to obtain possession. Eagle Rock Corp. v. Idamont Hotel Co., 60 Idaho 639, 95 P.2d 838 (1939).

The judge may grant a writ of assistance in vacation at chambers where the records showed a stipulation of counsel dictated to the court reporter, and reduced to writing by him, consenting to try a motion for the issuance of such writ at chambers before the judge. Eagle Rock Corp. v. Idamont Hotel Co., 60 Idaho 639, 95 P.2d 838 (1939).

Cited in: Pyle v. Woods, 18 Idaho 674, 111 P. 746 (1910); McDougall v. Sheridan, 23 Idaho 191, 128 P. 954 (1912); State v. Ricks, 34 Idaho 122, 201 P. 827 (1912); State v. Bilboa, 38 Idaho 92, 222 P. 785 (1923); Jones v. State, 85 Idaho 135, 376 P.2d 361 (1962).

RESEARCH REFERENCES

A.L.R. — Construction and validity of state provisions governing designation of substitute, pro tempore, or special judge. 97 A.L.R.5th 537.

1-1623. Idaho statewide trial court automated records system (ISTARS) technology fund. — There is hereby created in the office of the state treasurer the ISTARS technology fund. Moneys deposited into the fund pursuant to sections 31-3201, 31-3201A, 31-3201H and 31-3221, Idaho Code, upon appropriation by the legislature, shall be used by the supreme court for the purpose of maintaining, replacing and enhancing the Idaho Statewide Trial Court Automated Records System (ISTARS) program, and other technologies that assist in the efficient management of the courts, including a system for payments by credit card or debit card as provided in section 31-3221, Idaho Code, or that improve access to the courts and court records. The ISTARS technology fund shall be separate and distinct from the state general fund, and expenditures from the ISTARS technology fund shall be solely dedicated to the purposes set forth in this section. Moneys deposited into the fund may be allowed to accumulate from year to year for designated maintenance, replacement, extension or enhancement of the ISTARS program and for other technologies that assist in the efficient management of the courts. Interest earned on the investment of idle moneys in the ISTARS technology fund shall be returned to the ISTARS technology fund.

History.

I.C., § 1-1623, as added by 1997, ch. 28, § 1, p. 48; am. 1998, ch. 76, § 2, p. 274; am. 2005, ch. 240, § 1, p. 743; am. 2006, ch. 73, § 1, p. 226; am. 2010, ch. 205, § 1, p. 446.

STATUTORY NOTES

Amendments.

The 2006 amendment, by ch. 73, in the first sentence, inserted "and 31-3221" and "including a system for payments by credit card or debit card as provided in section 31-3221, Idaho Code"; and added "and for other technologies that assist in the efficient management of the courts" at the end of the third sentence.

The 2010 amendment, by ch. 205, inserted "31-3201H" in the first sentence.

Effective Dates.

Section 4 of S.L. 1997, ch. 28, read: "This act shall be in full force and effect on and after July 1, 1997, and the additional fees provided for herein shall apply to criminal and infraction offenses committed on or after July 1, 1997, and shall apply to civil case filing and appearances occurring on or after July 1, 1997." Approved March 12, 1997.

1-1624. Set-off procedure for delinquent debts owed to the courts. — (1) The purpose of this legislation is to enable the Idaho supreme court, as the supervisor of the unified and integrated judicial system of this state, to apply for a set-off of state tax refunds and credits owing to a taxpayer in payment of a delinquent debt owed by the taxpayer to the courts of this state. It is the intent of the legislature that this set-off remedy be in addition to and not in substitution of any other remedy or action provided for by law for the collection of these amounts.

(2) The state tax commission shall withhold and set-off any income tax or tax credit refund of any taxpayer, upon notification from the Idaho supreme court, to collect any debt owed to the courts by the taxpayer which is delinquent. A remittance by the state tax commission to the court pursuant to this section shall be deemed to be, to the extent of the remittance, a refund to the taxpayer and any other person who has a claim to such refund,

and the state tax commission shall not be liable to any person because of a refund that has been remitted under this section.

(3) A "debt owed to the courts" means any assessment of fines, court costs, surcharges, penalties, fees, restitution, moneys expended in providing counsel and other defense services to indigent defendants, or other charges which a court judgment has ordered to be paid to the court or which a party has agreed to pay in criminal or civil cases and includes any interest or penalty on such unpaid amounts as provided for in the judgment or by law, except this section does not apply to a debt owed to the courts which does not exceed the sum of fifty dollars ($50.00). A debt owed to the courts is delinquent when it is not paid according to the terms of the judgment or order or any agreement entered into between the court and the taxpayer for the payment thereof.

(4) Any claims for current or past-due child support presented under section 56-203D, Idaho Code, or claims for set-off of income tax refunds against any tax liability or overpayment of benefits owed to the state department of labor pursuant to section 63-3077A, Idaho Code, shall take priority over any claim for delinquent debt owed to the courts under this section.

(5) The set-off or withholding of a refund due a taxpayer shall be remitted only after the following conditions have been met:

(a) A debt owed to the courts is delinquent. This section shall not be used to satisfy any amount ordered by the court until the order or judgment is final and the time for appealing the judgment or order has elapsed without any further right on the part of the person owing the amount to judicial review.

(b) All outstanding tax liabilities collectible by the state tax commission are satisfied.

(c) The supreme court shall forward to the state tax commission the full name and social security number of the taxpayer. The tax commission shall notify the supreme court of the amount of refund due the taxpayer and the taxpayer's address on the income tax return.

(d) Upon remittance of any set-off or part thereof, the court shall cause a written notice to be sent to the taxpayer whose refund is subject to the set-off. Notice of the set-off shall be sent by United States mail to the taxpayer at the address listed on the income tax return. Within twenty-one (21) days after such notice has been mailed (not counting Saturday, Sunday or a state holiday as the twenty-first day), the taxpayer may file a written request for an administrative waiver of the set-off in accordance with procedures established by the supreme court, which may impose reasonable requirements concerning the information necessary to process the request for an administrative waiver. No issues or claims previously decided in a court order or judgment, or admitted or agreed to by the taxpayer, shall be considered in connection with a request for an administrative waiver. In the case of a refund that is set-off in error under this section, the court shall reimburse the taxpayer.

(6) The supreme court shall create a suspense account to pay amounts that are found to be set-off in error under the provisions of subsection (5)(d)

of this section or to refund any balance that remains after the debt to the courts is satisfied. If no written request for an administrative waiver of the set-off is made within twenty-one (21) days, such failure shall be deemed a waiver of the right to contest the set-off and the amount of the set-off shall be removed from the suspense account and shall be credited to the taxpayer's debt to the courts. The court may waive the twenty-one (21) day time limit in appropriate circumstances.

(7) When set-off is attempted on a joint return under the provisions of this section, the taxpayer not specified to be the obligor in the judgment or agreement creating the debt owed to the court may file a written objection within the time limits specified in subsection (5)(d) of this section and the set-off will be limited to one-half (1/2) of the joint refund.

(8) If the refund is insufficient to satisfy the entire debt owed to the courts, the remainder of the debt may be collected as provided by law or submitted for set-off against subsequent refunds.

(9) The proceeds from the set-off shall be credited to the debt owing to the courts and shall be distributed as provided by law.

(10) The state tax commission and the supreme court independently may adopt rules governing its administration of this section and are authorized to enter into a written agreement to implement and facilitate the provisions of this section, including the method of making remittances of the amount which has been set-off pursuant to this section.

History.
I.C., § 1-1624, as added by 2003, ch. 288, § 1, p. 778.

STATUTORY NOTES

Cross References.
State tax commission, § 63-101.

Compiler's Notes.
S.L. 2003, ch. 288, § 1, and ch. 291, § 2, both effective July 1, 2003, purported to enact a new section of chapter 16, title 1, Idaho Code, designated as § 1-1624. Section 1-1624 as enacted by ch. 288, § 1 was compiled as § 1-1624, and § 1-1624 as enacted by ch. 291, § 2, was compiled as § [1-1625] 1-1624. The section added by S.L. 2003, ch. 291 was permanently redesignated as § 1-1625 by S.L. 2004, ch. 318, § 1.

1-1625. Drug court, mental health court and family court services fund. — There is hereby created in the office of the state treasurer a special fund to be known as the drug court, mental health court and family court services fund. Moneys deposited into the fund pursuant to sections 19-4705, 23-217 and 31-3201H, Idaho Code, subject to appropriation by the legislature, shall be used by the supreme court for the operations of drug courts and mental health courts, including drug testing, substance abuse treatment and supervision, mental health assessment, treatment and supervision, and related court programs, as provided in chapter 56, title 19, Idaho Code, for the purpose of assisting children and families in the courts, as provided in chapter 14, title 32, Idaho Code, and for other court services as provided by statute.

History.
I.C., § 1-1624, as added by 2003, ch. 291, § 2, p. 791; am. and redesig. 2004, ch. 318, § 1, p. 892; am. 2005, ch. 360, § 1, p. 1144; am. 2010, ch. 205, § 2, p. 446.

STATUTORY NOTES

Amendments.
The 2010 amendment, by ch. 205, inserted "and 31-3201H."

Compiler's Notes.
S.L. 2003, ch. 288, § 1, and ch. 291, § 2, both effective July 1, 2003, purported to enact a new section of chapter 16, title 1, Idaho Code, designated as § 1-1624. Section 1-1624 as enacted by ch. 288, § 1 was compiled as § 1-1624, and § 1-1624 as enacted by ch. 291, § 2, was compiled as § [1-1625] 1-1624. The section added by S.L. 2003, ch. 291 was permanently redesignated as § 1-1625 by S.L. 2004, ch. 318, § 1.

Effective Dates.
Section 14 of S.L. 2004, ch. 318 declared an emergency. Approved March 24, 2004.

CHAPTER 17

CODE PROVISIONS CONCERNING JUDGES

SECTION.

1-1701. Reference to code provisions concerning judges. [Repealed.]

STATUTORY NOTES

Compiler's Notes.
This section, which comprised R.C. & C.L., § 211; C.S., § 188; I.C.A., § 1-1701, was repealed by S.L. 1969, ch. 112, § 1.

CHAPTER 18

DISQUALIFICATION OF JUDGES

SECTION.

1-1801. Cases in which judge disqualified. [Repealed.]

STATUTORY NOTES

Compiler's Notes.
This section, which comprised C.C.P. 1881, § 59; R.S., R.C., & C.L., § 3900; C.S., § 6499; I.C.A., § 1-1801; am. 1933, ch. 218, § 1, p. 463; am. 1951, ch. 52, § 1, p. 75; am. 1957, ch. 79, § 1, p. 128; am. 1972, ch. 32, § 1, p. 49, was repealed by S.L. 1975, ch. 242, § 1. For present rule, see Idaho Civil Procedure Rules 40(d)(1), 40(d)(2), 40(d)(4), 40(d)(5).

1-1802. Judge cannot act as attorney. — A judge cannot act as attorney or counsel in a court in which he is judge, or in an action or proceeding removed therefrom to another court for trial or review, or in an action or proceeding from which an appeal may lie to his own court.

History.
C.C.P. 1881, § 60; R.S., R.C., & C.L., § 3901; C.S., § 6500; I.C.A., § 1-1802.

RESEARCH REFERENCES

Am. Jur. — 46 Am. Jur. 2d, Judges, §§ 46 to 49.

1-1803. Supreme and district judges. — A justice of the Supreme Court or judge of the district court cannot act as attorney or counsel in any court, except in an action or proceeding to which he is a party on the record.

History.
C.C.P. 1881, § 61; R.S., R.C., & C.L., § 3902; C.S., § 6501; I.C.A., § 1-1803.

JUDICIAL DECISIONS

Cited in: Roberts v. Wehe, 53 Idaho 783, 27 P.2d 964 (1933).

RESEARCH REFERENCES

Am. Jur. — 46 Am. Jur. 2d, Judges, § 80 et seq.

C.J.S. — 48A C.J.S., Judges, § 220 et seq.

1-1804. Judge not to have law partner. — No judge or other judicial officer shall have a partner acting as attorney or counsel in any court of this state.

History.
C.C.P. 1881, § 62; R.S., R.C., & C.L., § 3903; C.S., § 6502; I.C.A., § 1-1804.

CHAPTER 19

INCIDENTAL POWERS AND DUTIES OF JUDICIAL OFFICERS

1-1901. Powers of judicial officers. — Every judicial officer has power:

1. To preserve and enforce order in his immediate presence, and in the proceedings before him, when he is engaged in the performance of an official duty.

2. To compel obedience to his lawful orders, as provided in this code.

3. To compel the attendance of persons to testify in a proceeding before him, in the cases and manner provided in this code.

4. To administer oaths to persons in a proceeding pending before him, and in all other cases where it may be necessary in the exercise of his powers and duties.

History.
C.C.P. 1881, § 64; R.S., R.C., & C.L., § 3911; C.S., § 6503; I.C.A., § 1-1901.

STATUTORY NOTES

Cross References.
Similar powers of courts, § 1-1603.

Compiler's Notes.
The words "this code" refer to the Code of Civil Procedure, which is currently a division of the Idaho Code consisting of Titles 1 through 13.

JUDICIAL DECISIONS

ANALYSIS

Administrative judge as judicial officer.
Immunity.

Administrative Judge as Judicial Officer.
Section 1-907, which lists the powers and duties of an administrative judge, does not include contempt powers. However, § 1-1603 provides that "[e]very court has power: ... [t]o compel obedience to its ... orders ...," and this section equips each "judicial officer" with similar powers. Although there is no case law as to whether an administrative judge is classified as a judicial officer, it is reasonable to assume that he is. Crooks v. Maynard, 913 F.2d 699 (9th Cir. 1990).

Immunity.
A district judge who was also serving as an administrative district judge was cloaked in absolute judicial immunity from liability when he jailed a clerk and deputy clerk of court pursuant to a contempt order even though the judge was not in chambers nor were the parties involved in an adversary proceeding; jurisdiction is construed broadly where the issue is the immunity of a judge. Crooks v. Maynard, 913 F.2d 699 (9th Cir. 1990).

Cited in: State ex rel. Evans v. Click, 102 Idaho 443, 631 P.2d 614 (1981); Marks v. Vehlow, 105 Idaho 560, 671 P.2d 473 (1983); Reeves v. Reynolds, 112 Idaho 574, 733 P.2d 795 (Ct. App. 1987); Crooks v. Maynard, 851 F.2d 1562 (9th Cir. 1988); Weyyakin Ranch Property Owners' Ass'n v. City of Ketchum, 127 Idaho 327, 896 P.2d 327 (1995); Smith v. Smith, 136 Idaho 120, 29 P.3d 956 (Ct. App. 2001).

1-1902. Judicial officer may punish for contempt. — For the effectual exercise of the powers conferred by the last section, a judicial officer may punish for contempt, in the cases provided in this code.

History.
C.C.P. 1881, § 65; R.S., R.C., & C.L., § 3912; C.S., § 6504; I.C.A., § 1-1902.

STATUTORY NOTES

Cross References.
Contempt proceedings, § 7-601 et seq.

Compiler's Notes.
The words "this code" refer to the Code of Civil Procedure, which is currently a division of the Idaho Code consisting of Titles 1 through 13.

JUDICIAL DECISIONS

ANALYSIS

Continuing contempt.
Hearing of contempt.
Institution of contempt by the judge.
Issues in main action.
Venue of proceeding.

Continuing Contempt.

A recalcitrant witness may be cited for contempt; continued refusal to answer questions within an area results in but a single contempt of a continuing nature and, to counter such contempt, civil as well as criminal contempt sanctions may be imposed although the imposition of multiple criminal sanctions is impermissible. Marks v. Vehlow, 105 Idaho 560, 671 P.2d 473 (1983).

Hearing of Contempt.

A district judge may hear contempt proceedings in open court or at chambers within his district. Greene v. Edgington, 37 Idaho 1, 214 P. 751 (1923).

Institution of Contempt by the Judge.

The judge may initiate contempt proceedings on his own motion. Greene v. Edgington, 37 Idaho 1, 214 P. 751 (1923).

Issues in Main Action.

A judge cannot, when one not a party to a judgment sets up a bona fide claim of right or title to the property involved in the action, determine that issue in a contempt proceeding. Greene v. Edgington, 37 Idaho 1, 214 P. 751 (1923).

Venue of Proceeding.

A judge who has tried a case and rendered a judgment in another district than his own can not institute or hear contempt proceedings arising out of matters connected therewith outside of the district in which it was rendered; in other words, the venue of a contempt proceeding is the judicial district in which it was committed. Greene v. Edgington, 37 Idaho 1, 214 P. 751 (1923).

Cited in: State ex rel. Evans v. Click, 102 Idaho 443, 631 P.2d 614 (1981); Weyyakin Ranch Property Owners' Ass'n v. City of Ketchum, 127 Idaho 327, 896 P.2d 327 (1995).

RESEARCH REFERENCES

C.J.S. — 17 C.J.S., Contempt, §§ 45 to 61, 63 to 70, 75, 76.

1-1903. Judges may take acknowledgments, affidavits and depositions. — The justices of the Supreme Court, the judges of the district courts and the magistrates of the district courts have the power in any part of the state to take and certify:

1. The proof and acknowledgment of a conveyance of real property or any other written instrument.
2. The acknowledgment of a satisfaction of a judgment of any court.
3. An affidavit or deposition to be used in this state.

History.

C.C.P. 1881, § 66; R.S., R.C., & C.L., § 3913; C.S., § 6505; I.C.A., § 1-1903; am. 1969, ch. 106, § 1, p. 361.

STATUTORY NOTES

Cross References.

Power to take acknowledgments generally, § 55-701 et seq.

Effective Dates.

Section 2 of S.L. 1969, ch. 106 provided that the act should be effective at 12:01 A.M. on January 11, 1971.

CHAPTER 20

JUDGES' RETIREMENT AND COMPENSATION

1-2001. Supreme court justices, court of appeals judges and district judges — Age of retirement — Compensation on retirement. — (1) Every person who served as a justice of the supreme court or judge of the court of appeals or district judge of the district court and is receiving benefits from the judges' retirement fund for such service, shall be entitled to benefits from the fund according to the formula for calculating such benefits as provided in section 1-2001(2)(a), Idaho Code.

(2) Any person who is now serving or who shall hereafter serve as a justice of the supreme court, a judge of the court of appeals, or a district judge of a district court of this state shall prior to retirement elect in writing to retire under either paragraph (a) or (b) of this subsection. Any person who fails to make the election provided for in this subsection prior to retirement shall receive retirement compensation under the provisions of paragraph (a) of this subsection.

(a) On or after July 1, 2000, any person who has served or who is now serving or who shall hereafter serve as a justice of the supreme court, a judge of the court of appeals, or a district judge of a district court of this state may leave office or retire and be entitled to receive and to have paid from the date of his retirement until death, an annual retirement compensation based upon a percentage of the current annual compensation of the highest office in which he served. The percentage shall be equal to five percent (5%) multiplied by the number of years served as either justice or judge or both, for the first ten (10) years of service plus two and one-half percent (2 1/2%) multiplied by the remaining number of years served as either justice or judge or both, but in any event the total shall not be greater than seventy-five percent (75%) of the current annual compensation of the highest office in which he served, payable in monthly installments on the first day of each month.

(b) On or after July 1, 2000, any person who is now serving or who shall hereafter serve as a justice of the supreme court, a judge of the court of

appeals, or a district judge of a district court of this state may retire from office and be entitled to receive and to have paid from the date of his retirement until death, an annual retirement compensation based upon a percentage of the current annual compensation of the highest office in which he served. The percentage shall be equal to five percent (5%) multiplied by the number of years served as either justice or judge or both for the first ten (10) years of service plus two and one-half percent (2 1/2%) multiplied by the remaining number of years served as either justice or judge or both, plus two and one-half percent (2 1/2%) multiplied by five (5) years senior judge service but in any event the total shall not be greater than seventy-five percent (75%) of the current annual compensation of the highest office in which he served, payable in monthly installments on the first day of each month.

(c) A justice or judge electing to retire under paragraph (b) of this subsection shall serve as a senior judge, without compensation other than annual health benefits, for thirty-five (35) days per year for a period of five (5) years. A justice or judge who serves more than thirty-five (35) days per year may carry over the additional days to fulfill the senior judge service obligation in future years. The terms and conditions of such senior judge service shall be as provided under section 1-2005, Idaho Code.

(d) Upon certification from the chief justice that any justice or judge who retired under paragraph (b) of this subsection has failed to perform the senior judge services required under paragraph (c) of this subsection, and has not been relieved of the obligations to perform those services in the manner provided by this subsection, the judges' retirement fund shall recalculate the retirement compensation benefits of the noncomplying justice or judge under paragraph (a) of this subsection, and the noncomplying justice or judge shall thereafter receive only the recalculated amount.

(e) A justice or judge may be relieved of the senior judge service obligation imposed by this subsection if he fails for good cause to complete the obligation. A retired justice or judge who is relieved of the obligation to serve as a senior judge shall continue to receive the retirement allowance provided under paragraph (b) of this subsection.

(f) "Good cause" includes, but is not limited to:

(i) Physical or mental incapacitation of a justice or judge that prevents the justice or judge from discharging the duties of judicial office;

(ii) Failure of the supreme court to assign a senior judge to the requisite amount of senior judge service, whether because of insufficient need for senior judges, a determination by the supreme court that the skills of a senior judge do not match the needs of the courts, clerical mistake or otherwise; or

(iii) Death of a senior judge.

(g) "Good cause" does not include:

(i) A senior judge's refusal, without good cause, to accept senior judge assignments sufficient to meet the required amount; or

(ii) A senior judge's affirmative voluntary act that makes him unqualified to serve as a judge of this state including, but not limited to, failure

to maintain a residence within the state, commencing the practice of law other than as a mediator, arbitrator or similar alternative dispute resolution function, acceptance of a position in another branch of state government or political subdivision, or the acceptance of a position in the government of the United States or of another state or nation.

(h) The supreme court may make rules for the implementation of this subsection.

(3) On or after July 1, 2000, each person who has served but is not receiving benefits or who is now serving or who shall hereafter serve who shall leave office or retire as justice of the supreme court, judge of the court of appeals, or district judge of a district court in this state shall be eligible to receive an annual retirement compensation when such person shall meet one (1) of the following eligibility criteria:

(a) Attaining the age of sixty-five (65) years and having a minimum service of four (4) years;

(b) Attaining the age of sixty (60) years and having a minimum service of ten (10) years;

(c) Attaining the age of fifty-five (55) years and having a minimum service of fifteen (15) years; or

(d) At any age after twenty (20) years of service.

(4) On or after July 1, 2000, each justice or judge who is now serving or who shall hereafter be appointed or elected and who shall retire by reason of disability preventing him from further performance of the duties of his office, after a service in any or all of said courts of four (4) years or more, shall, upon retirement, be entitled to receive and to have paid to him until death an annual retirement compensation equal to five percent (5%) of the current annual compensation of the highest office in which he served, multiplied by the number of years served as either justice or judge or both, for the first ten (10) years of service, and equal to two and one-half percent (2 1/2%) of the current annual compensation of the highest office in which he served, multiplied by the remaining number of years served as either justice or judge or both, but such amount of annual retirement compensation shall not exceed seventy-five percent (75%) of the current annual compensation of the highest office in which he served, payable in monthly installments on the first day of each month.

(5) All retirement compensation shall be paid out of the judges' retirement fund, provided however, that a justice or judge who has served less than four (4) years shall be entitled to have refunded to him all contributions made by him to the judges' retirement fund, with six and one-half percent (6 1/2%) interest computed annually but shall not be entitled to any other compensation from the fund.

(6) Notwithstanding any other provision of this section, any person who makes an election to remain in the public employee retirement system of Idaho as provided in section 1-2011, Idaho Code, shall not participate in the judges' retirement fund established in this chapter, but shall continue to participate in the public employee retirement system of Idaho and be governed under the provisions of that system, except as provided in section 1-2005, Idaho Code.

History.
I.C., § 1-2001, as added by 2000, ch. 385, § 2, p. 1248.

STATUTORY NOTES

Cross References.
Judges' retirement fund, § 1-2002.
Public employee retirement system, § 59-1301 et seq.

Prior Laws.
Former § 1-2001, which comprised 1947, ch. 104, § 1, p. 210; am. 1949, ch. 130, § 1, p. 231; am. 1961, ch. 197, § 1, p. 304; am. 1965, ch. 308, § 1, p. 835; am. 1967, ch. 301, § 1, p. 853; am. 1969, ch. 183, § 1, p. 543; am. 1974, ch. 244, § 1, p. 1618; am. 1983, ch. 144, § 1, p. 363; am. 1998, ch. 126, § 1, p. 466., was repealed by S.L. 2000, ch. 385, § 1, effective July 1, 2000.

JUDICIAL DECISIONS

Recovery of Overpayment.
State auditor was entitled to recover overpayment paid to a judge due to a mistake of law. State v. McCarty, 76 Idaho 153, 279 P.2d 879 (1955).

1-2001a. Judges already retired — Retirement compensation — Act to operate prospectively. — Every person eligible for retirement compensation who has served as justice of the Supreme Court or judge of the district court who has retired or resigned before the effective date of this act shall be entitled to receive and to have paid to him from the judges' retirement fund, retirement compensation based upon the current annual compensation of the office from which he retired or resigned, less a sum equal to 10% of any increase in retirement compensation to which he may become entitled after the effective date of this act.

This act shall operate prospectively, and shall not give to any retired justice or judge a claim against the judges' retirement fund for any increase in retirement compensation for time elapsed prior to the effective date hereof.

History.
I.C., § 1-2001a, as added by 1965, ch. 308, § 2, p. 835; am. 1967, ch. 301, § 2, p. 853; am. 1969, ch. 183, § 2, p. 543.

STATUTORY NOTES

Compiler's Notes.
The phrases "effective date of this act" near the middle of the first paragraph and "effective date hereof" at the end of the second paragraph refer to the effective date of S.L. 1965, ch. 308, which was July 1, 1965.
The phrase "effective date of this act" at the end of the first paragraph refers to the effective date of S.L. 1967, ch. 301, which was July 1, 1967.

1-2001b. Conversion of retirement compensation into optional retirement allowances — Form of optional retirement. — (1) The retirement compensation of a justice or judge who, at the time of retirement, so elects shall be converted into an optional retirement allowance which is the actuarial equivalent of such retirement compensation to which the justice or judge would otherwise be entitled under section 1-2001, Idaho Code, including the value of the spousal benefit provided by section 1-2009, Idaho Code, provided the spouse is the contingent annuitant. The optional

retirement allowance may take one (1) of the forms listed below and shall be in lieu of all other retirement compensation and benefits under this chapter, except the death benefit provided by section 1-2010, Idaho Code.

(a) Option 1 provides a reduced retirement allowance payable during the lifetime of the retired justice or judge, and a continuation thereafter of such reduced retirement allowance during the lifetime of the justice or judge's named contingent annuitant.

(b) Option 2 provides a reduced retirement allowance payable during the lifetime of the retired justice or judge, and a continuation thereafter of one-half (1/2) of such reduced retirement allowance during the lifetime of the justice or judge's named contingent annuitant.

(2) Should the named contingent annuitant under option 1 or option 2 predecease a justice or judge, upon notification to the supreme court, the justice or judge's benefit on the first day of the month following the death of the contingent annuitant will thereafter become an allowance calculated pursuant to section 1-2001, Idaho Code.

(3) Application for any optional retirement allowance shall be in writing, duly executed and filed with the supreme court. Such application shall contain all information required by the supreme court, including such proofs of age as are deemed necessary by the supreme court.

(4) A retirement option elected at the time of retirement as provided for in this section may not be changed except by written notice to the supreme court no later than five (5) business days after the receipt of the first retirement allowance.

(5) Not later than one (1) year after the marriage of a retired justice or judge, the justice or judge may elect option 1 or 2 to become effective one (1) year after the date of such election, provided the justice or judge's spouse is named as a contingent annuitant, and either:

(a) The justice or judge was not married at the time of retirement; or

(b) The justice or judge earlier elected option 1 or 2, having named the justice or judge's spouse as contingent annuitant, and said spouse has died.

(6) Each justice or judge receiving retirement compensation on July 1, 2000, shall have a one-time irrevocable election to name a spouse as a contingent annuitant under subsection (1)(a) of this section.

History.
I.C., § 1-2001b, as added by 2000, ch. 385, § 3, p. 1248.

1-2002. Judges' retirement fund. — For the purpose of paying such retirement compensation, there is hereby created in the office of the treasurer of the state of Idaho a fund to be known as the "Judges' Retirement Fund," which shall consist of all moneys appropriated from the general fund, and all moneys received from special fees to be paid by parties to civil actions and proceedings, other than criminal, commenced in or appealed to the several courts of the state, together with all contributions out of the salaries and compensation of justices and judges, and interest received from investment, and reinvestment, of moneys of the judges'

retirement fund, all as hereinafter provided.

All sums of money so accrued and accruing to the judges' retirement fund, less an amount deemed reasonable and necessary by the administrative director of the courts to pay for necessary actuarial studies to assist in administering the judges' retirement fund, are hereby appropriated to the payment of the annual retirement compensation of such retired justices and judges, and to payment of the allowances to surviving spouses.

History.
1947, ch. 104, § 2, p. 210; am. 1965, ch. 308, § 3, p. 835; am. 1982, ch. 299, § 1, p. 760.

JUDICIAL DECISIONS

Cited in: State v. McCarty, 76 Idaho 153, 279 P.2d 879 (1955).

1-2003. Additional fees in civil actions and appeals. — (a) In addition to the fees and charges to be collected by the clerks of the district courts of the state and by other persons authorized by rule or administrative order of the Supreme Court as now or hereafter provided by law, such clerks and authorized persons are directed to charge and collect the additional sum of eighteen dollars ($18.00) for filing a civil case or proceeding of any type in the district court or magistrate's division of the district court including cases involving the administration of decedents' estates, whether testate or intestate, conservatorships of the person or of the estate or both and guardianships of the person or of the estate or both, except that no fee shall be charged or collected for filing a proceeding under the Summary Administration of Small Estates Act. The additional sum of eighteen dollars ($18.00) shall also be collected from any party, except the plaintiff, making an appearance in any civil action in the district court, but such eighteen dollars ($18.00) fee shall not be collected from the person making an appearance in civil actions filed in the small claims departments of the district court.

(b) The sum of eighteen dollars ($18.00) shall also be collected:

(1) from an intervenor in an action;

(2) from a party who files a third party claim;

(3) from a party who files a cross claim;

(4) from a party appealing from the magistrate's division of the district court to the district court;

(5) from a party appealing the decision of any commission, board or body to the district court.

(c) The clerk of the Supreme Court is authorized and directed to charge and collect, in addition to the fees now prescribed by law and as a part of the cost of filing the transcript on appeal in any civil case or proceeding, other than criminal, appealed to the Supreme Court, the additional sum of eighteen dollars ($18.00); for filing a petition for rehearing, the additional sum of ten dollars ($10.00); for filing an application for any writ for which a fee is now prescribed, the additional sum of ten dollars ($10.00); for filing

appeals from the industrial accident board, the additional sum of five dollars ($5.00).

(d) The clerks of the district courts, persons authorized by rule or administrative order of the Supreme Court and the clerk of the Supreme Court are directed and required to remit all additional charges and fees authorized by this section and collected during a calendar month, to the state treasurer within five (5) days after the end of the month in which such fees were collected. The state treasurer shall place all such sums in the judges' retirement fund.

History.

1947, ch. 104, § 3, p. 210; am. 1963, ch. 169, § 2, p. 489; am. 1967, ch. 246, § 1, p. 713; am. 1967 (1st E.S.), ch. 6, § 1, p. 26; am. 1969, ch. 138, § 1, p. 424; am. 1979, ch. 219, § 3, p. 607; am. 1983, ch. 144, § 4, p. 363; am. 1990, ch. 246, § 1, p. 699.

STATUTORY NOTES

Cross References.

Reference to industrial accident board to mean industrial commission, § 72-502.

Compiler's Notes.

The Summary Administration of Small Estates Act, referred to in subsection (a) of this section, has been repealed. See now § 15-3-1201 et seq.

Effective Dates.

Section 2 of S.L. 1967 (E.S.), ch. 6 declared an emergency. Approved July 1, 1967.

Section 2 of S.L. 1969, ch. 138 provided that the act should become effective at 12:01 A.M. on January 11, 1971.

Section 7 of S.L. 1979, ch. 219 provided that the act should take effect July 1, 1979.

Section 5 of S.L. 1983, ch. 144 provided that the act should be in full force and effect on and after July 1, 1983 and provided that the amendments to section 1 implemented by the act should apply only to those persons who are in active service on and after July 1, 1983. Approved April 4, 1983.

JUDICIAL DECISIONS

Cited in: State v. McCarty, 76 Idaho 153, 279 P.2d 879 (1955).

1-2004. Deductions from salaries of justices and judges — Contributions to fund. — The state controller shall deduct from the monthly compensation of each justice and judge now holding office, and from the monthly compensation of each person who shall thereafter assume by election or appointment the office of a justice of the Supreme Court or a judge of a district court, an amount equal to six per cent (6%) of his monthly compensation, and shall issue to such justice or judge a salary warrant in such reduced amount, and shall pay the withheld sums into the judges' retirement fund; provided, however, that after twenty (20) years of service no deductions shall be taken from a judge's compensation for payment to the judges' retirement fund. Between the first and twentieth day of each month, the Supreme Court shall, from appropriations made for that purpose as part of the employer's contribution, remit to the judges' retirement fund an amount equal to seven per cent (7%) of salaries paid during the previous month to justices and judges who are making contributions to the judges' retirement fund.

History.

1947, ch. 104, § 4, p. 210; am. 1955, ch. 62, § 1, p. 120; am. 1965, ch. 308, § 4, p. 835; am. 1967, ch. 301, § 3, p. 853; am. 1969, ch. 183, § 3, p. 543; am. 1976, ch. 343, § 2, p. 1145; am. 1987, ch. 107, § 1, p. 219; am. 1994, ch. 180, § 3, p. 420.

STATUTORY NOTES

Cross References.

Judges' retirement fund, § 1-2002.

State controller, § 67-1001 et seq.

Effective Dates.

Section 3 of S.L. 1976, ch. 343 provided that the act should be in full force and effect on and after July 1, 1976.

Section 2 of S.L. 1987, ch. 107 provided that the act should take effect on and after July 1, 1987.

Section 241 of S.L. 1994, ch. 180 provided that such act should become effective on and after the first Monday in January, 1995 [January 2, 1995] if the amendment to the Constitution of Idaho changing the name of the state auditor to state controller [1994 S.J.R. No. 109, p. 1493] was adopted at the general election held on November 8, 1994. Since such amendment was adopted, the amendment to this section by § 3 of S.L. 1994, ch. 180 became effective January 2, 1995.

JUDICIAL DECISIONS

Retirement Benefits.

District judge appointed to bench in 1944 to fill out term of a prior elected judge, and who was subsequently elected to new four-year terms on January 1, 1947, and January 1, 1951, but who rejected compensation plan for retirement in 1947 was not entitled to writ of mandamus to compel state officer to pay retirement benefits following his retirement in 1953 since officer had not deducted 3% of his salary, but he was entitled to retirement compensation if within 20 days after entry of decree he paid 3% of his wages from January 1, 1951 to date of retirement. Wilson v. Nielson, 75 Idaho 145, 269 P.2d 762 (1954).

Cited in: State v. McCarty, 76 Idaho 153, 279 P.2d 879 (1955).

1-2005. Senior judge — Assignment — Duties and powers — Compensation and expenses — Qualifications and oath. — (1) A justice or judge who leaves office or retires from the supreme court, court of appeals or a district court, except a justice or judge retired under the provisions of section 1-2001(4), Idaho Code, may be designated a senior judge of the state of Idaho by the supreme court.

(2) Upon filing with the secretary of state an oath of office as a senior judge as prescribed in subsection (7) of this section, a senior judge is eligible for temporary assignment by the supreme court to a state court as provided in this subsection, whenever the supreme court determines that the assignment is reasonably necessary and will promote the more efficient administration of justice. A senior judge may sit as a district or magistrate judge of the district court of any county or may sit with the supreme court or court of appeals or may perform such other duties pertaining to the judicial department of government as may be requested.

(3) The assignment of a senior judge shall be made by an order which shall designate the court or duties to which the judge is assigned and the duration of the assignment. Promptly after assignment of a senior judge under this section, the supreme court shall cause a certified copy of the order to be sent to the senior judge and another certified copy to the court to which the judge is assigned.

(4) Each senior judge assigned as provided in this section has all the judicial powers and duties, while serving under the assignment, of a regularly qualified judge of the court to which the senior judge is assigned.

(5) A senior judge assigned as provided in this section, other than one performing services required by section 1-2001(2)(b), Idaho Code, shall receive as compensation for each day the senior judge is actually engaged in the performance of duties under the assignment an amount equal to eighty-five percent (85%) of the daily salary of the highest office in which the senior judge served. However, a retired judge shall not receive for services as a senior judge during any fiscal year a sum of money which when added to the amount of any judicial retirement pay received by the senior judge for the year exceeds the current annual salary of the highest office in which the senior judge served; except that this limitation shall not apply if the chief justice of the supreme court determines that extended service by one (1) or more senior judges is required because of extraordinary circumstances, such as a natural disaster or a judge's absence from service due to military service or medical disability. Services by a senior judge under an assignment and receipt of compensation for services shall not reduce or otherwise affect the amount of any retirement pay to which the senior judge otherwise would be entitled. Such additional compensation above the retirement compensation benefits accruing to such senior judge shall be paid from the general fund in accordance with appropriations provided by the legislature.

(6) A senior judge assigned to a court located outside the county in which the senior judge regularly resides shall receive, in addition to any daily compensation, reimbursement for traveling and subsistence expenses necessarily incurred in the performance of duties under the assignment. The expenses shall be paid upon presentation of an itemized statement of the expenses, certified by the senior judge to be correct.

(7) To be eligible for assignment, a senior judge must: maintain a residence within the state; not engage in the practice of law other than as a mediator or arbitrator or similar alternate dispute resolution function; not accept a position in another branch of state government or any political subdivision; not accept a position in the government of the United States or of another state or nation; and take, subscribe and file with the secretary of state, the following oath or affirmation:

> "I, ..., do solemnly swear (or affirm, as the case may be) that as a senior judge of the state of Idaho, I will support the Constitution of the United States and the Constitution of the State of Idaho, and that upon hereafter accepting any assignment to serve as a judge of a court of this state I will faithfully discharge the duties thereof to the best of my ability.".

(8) Except as provided in section 1-2001(2)(b), Idaho Code, any period of service rendered by a senior judge shall not in any way be computed for additional retirement benefits, and the state controller shall not receive or deduct any sum for transfer to the judges' retirement fund or to the public employee retirement system of Idaho.

History.
I.C., § 1-2005, as added by 2000, ch. 385, § 5, p. 1248; am. 2005, ch. 188, § 1, p. 574.

STATUTORY NOTES

Cross References.
Judges' retirement fund, § 1-2002.
Public employees retirement system, § 59-1301 et seq.

Prior Laws.
Former § 1-2005, which comprised 1947, ch. 104, § 5, p. 210; am. 1949, ch. 130, § 2, p. 231; am. 1967, ch. 301, § 4, p. 853; am. 1976, ch. 234, § 1, p. 825; am. 1980, ch. 178, § 1, p. 380; am. 1983, ch. 18, § 2, p. 52; am. 1994, ch. 180, § 4, p. 420; am. 1998, ch. 126, § 2, p. 466, was repealed by S.L. 2000, ch. 385, § 4, effective July 1, 2000.

Compiler's Notes.
The words enclosed in parentheses so appeared in the law as enacted.

JUDICIAL DECISIONS

Applicability.
Court properly denied a debtor's Idaho Civil Procedure Rule 40(d)(1) disqualification motion in creditors' quiet title action, because senior judges appointed under this section were excepted from Rule 40(d)(1) motions to disqualify without cause, and a nunc pro tunc order retroactively and properly assigned the judge to the case. Merrill v. Gibson, 139 Idaho 840, 87 P.3d 949, cert. denied, 543 U.S. 926, 125 S. Ct. 311, 160 L. Ed. 2d 225 (2004).

Decisions Under Prior Law

Appointments.
A retired district judge may hold a district court position upon the request and order of the chief justice. State v. Pratt, 128 Idaho 207, 912 P.2d 94 (1996).

1-2006. Application of act. — Chapter 20, title 1, Idaho Code, shall operate prospectively in its application as to all persons who are receiving retirement benefits thereunder, provided that the Supreme Court may by order apply all of the provisions of this chapter to service under section 1-611, Idaho Code.

In no case shall any justice or judge, serving at the time this act becomes effective, receive and have paid to him, at the time of his retirement, retirement compensation in any lesser amount than he would have become entitled to receive and have paid to him under the act as it existed prior to this amendment.

History.
1947, ch. 104, § 6, p. 210; am. 1959, ch. 131, § 1, p. 279; am. 1967, ch. 301, § 5, p. 853; am. 1969, ch. 183, § 4, p. 543; am. 1983, ch. 144, § 2, p. 363.

JUDICIAL DECISIONS

Cited in: State v. McCarty, 76 Idaho 153, 279 P.2d 879 (1955).

1-2007. Age limit — Eligibility to service as justice or judge. [Repealed.]

STATUTORY NOTES

Compiler's Notes.
This section, which comprised 1947, ch. 104, § 7, p. 210; am. 1949, ch. 130, § 3, p. 231, was repealed by S.L. 1984, ch. 91, § 1.

1-2008. Investment of judges' retirement fund. — (1) The endowment fund investment board established in section 57-718, Idaho Code, shall at the direction of the supreme court select and contract with investment managers to manage the investment of the judges' retirement fund. The investment managers shall, subject to the direction of the board, exert control over the funds as though the investment managers were the owner thereof and are hereby authorized to invest the judges' retirement fund as hereinafter provided.

(a) Subject to the approval of the supreme court, the investment board shall formulate an investment policy governing the investment of judges' retirement funds. The policy shall pertain to the types, kinds or nature of investment of any of the funds, and any limitations, conditions or restrictions upon the methods, practices or procedures for investment, reinvestments, purchases, sales or exchange transactions, provided such policy shall not conflict with nor be in derogation of any Idaho constitutional provision or of the provisions of this chapter. Provided further, the supreme court may, in its sole discretion, limit any of the investments permitted by the investment policy.

(b) In acquiring, investing, reinvesting, exchanging, retaining, selling and managing the moneys and securities of the fund, investment managers shall also be governed by the prudent man investment act, sections 68-501 through 68-506, Idaho Code; provided, however, that the supreme court may in its sole discretion, limit the types, kinds and amounts of such investments.

(2) The investment board shall be responsible for assuring that the investment managers comply with this section.

(3) The investment board, subject to the approval of the supreme court, is hereby authorized to select and contract with a bank or trust company authorized to do business in the state of Idaho, to act as custodian of the judges' retirement fund, who shall hold all securities and moneys of the judges' retirement fund and shall collect the principal, dividends and interest thereof when due and pay the same into the judges' retirement fund.

(4) The state treasurer shall pay all warrants drawn on the judges' retirement fund for making such investments when issued pursuant to vouchers signed by the chief justice of the supreme court.

History.

I.C., § 1-2008, as added by 1990, ch. 247, § 2, p. 700; am. 1994, ch. 180, § 5, p. 420; am. 2003, ch. 32, § 2, p. 115; am. 2004, ch. 240, § 1, p. 702.

STATUTORY NOTES

Prior Laws.

Former § 1-2008, which comprised I.C., § 1-2008, as added by 1959, ch. 131, § 2, p. 279; am. 1969, ch. 466, § 1, p. 1326; am. 1970, ch. 116, § 1, p. 277; am. 1974, ch. 22, § 55, p. 592, was repealed by S.L. 1990, ch. 247, § 1.

Another former § 1-2008 which comprised S.L. 1947, ch. 104, § 8, p. 210 was repealed by § 4 of S.L. 1949, ch. 104.

Compiler's Notes.

The prudent man investment act, referred to in paragraph (1)(b), was enacted by S.L. 1949, ch. 36, §§ 1 to 5. That act was repealed by S.L. 1997, ch. 14, which also enacted the Idaho uniform prudent investor act. See § 68-501 et seq.

Effective Dates.

Section 241 of S.L. 1994, ch. 180 provided that such act should become effective on and after the first Monday in January, 1995 [January 2, 1995] if the amendment to the Constitution of Idaho changing the name of the state auditor to state controller [1994 S.J.R. No. 109, p. 1493] was adopted at the general election held on November 8, 1994. Since such amendment was adopted, the amendment to this section by § 5 of S.L. 1994, ch. 180 became effective January 2, 1995.

Section 2 of S.L. 2004, ch. 240 declared an emergency retroactively to January 1, 2004. Approved March 23, 2004.

1-2008A. Investment trustee. [Repealed.]

STATUTORY NOTES

Compiler's Notes.

This section, which comprised I.C., § 1-2008A, as added by 1970, ch. 116, § 2, p. 277; am. 1974, ch. 22, § 56, p. 592, was repealed by S.L. 1990, ch. 247, § 1.

1-2009. Benefit to surviving spouse of justice or judge. — The legislature hereby finds and declares that the payment of allowances to the surviving spouses of justices of the supreme court, judges of the court of appeals and district judges of the district court of the state of Idaho, serves the public purpose of promoting the public welfare by encouraging experienced jurists to continue their service and that their continued service and increased efficiency will be secured in the expectation that the legislature will fairly provide for their surviving spouses, and that such continued service and increased efficiency of such jurists, secure in this knowledge, will be of substantial benefit to the state.

The surviving spouse, of any justice or judge entitled to benefits under this chapter who dies on or after July 1, 1965, shall receive an allowance from the judges' retirement fund, payable monthly, and as hereinafter provided.

(a) In the case of a justice or judge receiving retirement compensation at the time of death, allowance to his surviving spouse shall commence immediately and be payable to such spouse from such fund in an amount equal to fifty percent (50%) of the retirement compensation to which such justice or judge would be entitled under section 1-2001(2), Idaho Code.

(b) In the case of a justice or judge who has service as a justice of the supreme court, judge of the court of appeals or district judge of four (4) years or more and is not receiving retirement compensation at the time of death, commencing immediately, the surviving spouse shall be paid an allowance from such fund in the amount of fifty percent (50%) of the retirement compensation to which the justice or judge would have been entitled under section 1-2001(2)(a), Idaho Code, as if the justice or judge was eligible to retire and had retired immediately before his death.

(c) The allowance shall be paid until the death of the surviving spouse.

(d) The surviving spouse of a justice or judge who is not receiving benefits from the judges' retirement fund at the time of the justice's or judge's death may elect to take an optional retirement allowance as a surviving annuitant under option 1 of section 1-2001b(1)(a), Idaho Code. Such optional retirement allowance shall be calculated as if the justice or judge was eligible to retire and had retired immediately before his death.

History.
I.C., § 1-2009, as added by 1965, ch. 308, § 5, p. 835; am. 1967, ch. 301, § 6, p. 853; am. 1969, ch. 183, § 5, p. 543; am. 1974, ch. 244, § 2, p. 1618; am. 1983, ch. 144, § 3, p. 363; am. 1997, ch. 150, § 1, p. 427; am. 2000, ch. 385, § 6, p. 1248.

STATUTORY NOTES

Effective Dates.
Section 6 of S.L. 1965, ch. 308 provided that the act should be in full force and effect from and after July 1, 1965.
Section 7 of S.L. 1967, ch. 301 provided the act should become effective from and after July 1, 1967.
Section 3 of S.L. 1974, ch. 244 provided that the act should be in full force and effect on and after July 1, 1974.

1-2010. Death benefit. — (1) The death benefit of a deceased justice or judge is the excess, if any, of the justice's or judge's accumulated contributions to the judges' retirement fund, including accrued interest at the rate provided in section 1-2001(5), Idaho Code, over the aggregate of all retirement compensation payments and allowances ever made to the justice, judge, spouse or annuitant from the judges' retirement fund.

(2) The death benefit is payable, and all other retirement compensation benefits and allowances shall cease, upon the death of the justice, judge, spouse or annuitant receiving a retirement compensation or allowance.

(3) The death benefit shall be paid to the beneficiary named by the justice or judge in a written designation of beneficiary on file with the supreme court if the beneficiary is surviving at the time the death benefit is payable; otherwise the death benefit shall be paid to the estate of the deceased justice or judge for distribution in accordance with the laws of descent and distribution of the state of Idaho as they may then be in effect.

History.
I.C., § 1-2010, as added by 1997, ch. 150, § 2, p. 427; am. 2000, ch. 385, § 7, p. 1248.

STATUTORY NOTES

Effective Dates.
Section 3 of S.L. 1997, ch. 150 read: "This act shall be in full force and effect on and after July 1, 1997, but provided that Section 2 of this act shall apply only in the event of the death of a justice, judge or spouse occurring on or after July 1, 1997."

1-2011. Election to continue participation in the public employee retirement system of Idaho. — On and after July 1, 1998, any vested member of the public employee retirement system of Idaho may, within thirty (30) days of becoming a justice of the supreme court, judge of the court of appeals or district judge in the state of Idaho, make a one-time irrevocable election to continue participation as an active member of that system in lieu of participation in the judges' retirement fund established in this chapter and the justice, judge or spouse shall not be entitled to any compensation, benefits or allowances under any provision of this chapter. An election must be in writing and must be provided to both the supreme court and the public employee retirement system of Idaho. Once an election is made, all service as justice or judge, including noncontinuous service, shall be accrued to the public employee retirement system of Idaho, and shall be governed under

the provisions of that system, except as provided in section 1-2005, Idaho Code.

History.
I.C., § 1-2011, as added by 1998, ch. 126, § 3, p. 466.

STATUTORY NOTES

Cross References.
Public employees retirement system, § 59-1301 et seq.

1-2012. Rules and administrative policies. — Subject to the other provisions of this chapter, the supreme court shall have the power and authority to adopt, amend and rescind such rules and administrative policies as may be necessary for the proper administration of this chapter.

History.
I.C., § 1-2012, as added by 2006, ch. 72, § 1, p. 225.

CHAPTER 21

JUDICIAL COUNCIL

1-2101. Judicial council — Creation — Membership — Appointments — Vacancies. — (1) There is hereby created a judicial council which shall consist of seven (7) permanent members, and one (1) adjunct member. Three (3) permanent attorney members, one (1) of whom shall be a district judge, shall be appointed by the board of commissioners of the Idaho state bar with the consent of the senate. Three (3) permanent non-attorney members shall be appointed by the governor with the consent of the senate. If any of the above appointments be made during a recess of the senate, they shall be subject to consent of the senate at its next session. The term of office for a permanent appointed member of the judicial council shall be six (6) years. Vacancies shall be filled for the unexpired term in like manner. Appointments shall be made with due consideration for area representation and not more than three (3) of the permanent appointed members shall be from one (1) political party. The chief justice of the Supreme Court shall be the seventh member and chairman of the judicial council. No permanent member of the judicial council, except a judge or justice, may hold any other office or position of profit under the United States or the state. The judicial council shall act by concurrence of four (4) or more members and according to rules which it adopts.

(2) In addition to the permanent members of the judicial council, whenever there is an issue before the council which involves the removal, discipline or recommendation for retirement of a district court magistrate, the chief justice shall appoint an adjunct member of the judicial council, who shall be a district court magistrate. For all purposes for which the adjunct appointment is made, the adjunct member shall be a full voting member of the judicial council.

History.
1967, ch. 67, § 1, p. 153; am. 1990, ch. 71, § 1, p. 152.

STATUTORY NOTES

Cross References.
Board of commissioners of the Idaho state bar, § 3-401 et seq.

JUDICIAL DECISIONS

Analysis

Political parties.
Separation of powers.

Political Parties.
Citizens did not have any right to have a member of their political party appointed to the Idaho judicial council member's seat, and they did not have a right to have someone appointed who would share their political or philosophical beliefs. This section does not require that membership on the council include persons from any particular political party, or that the members even be from a political party. Troutner v. Kempthorne, 142 Idaho 389, 128 P.3d 926 (2006).

Separation of Powers.
Whether or not the Idaho judicial council member's appointment violated this section was an issue that the senate could, and did, debate prior to his confirmation vote; it would violate the separation of powers for the appellate court to substitute its view for that of the senate regarding whether the member was qualified to be appointed to the judicial council. Troutner v. Kempthorne, 142 Idaho 389, 128 P.3d 926 (2006).

1-2102. Duties of council. — The judicial council shall:

(1) Conduct studies for the improvement of the administration of justice;

(2) Make reports to the Supreme Court and legislature at intervals of not more than two (2) years;

(3) Submit to the governor the names of not less than two (2) nor more than four (4) qualified persons for each vacancy in the office of justice of the Supreme Court, judge of the court of appeals, or district judge, one (1) of whom shall be appointed by the governor; provided, that the council shall submit only the names of those qualified persons who are eligible to stand for election pursuant to section 1-2404, 34-615, or 34-616, Idaho Code;

(4) Recommend the removal, discipline and retirement of judicial officers, including magistrates; and

(5) Such other duties as may be assigned by law.

History.
1967, ch. 67, § 2, p. 153; am. 1985, ch. 29, § 3, p. 52; am. 1990, ch. 71, § 2, p. 152.

STATUTORY NOTES

Effective Dates.

Section 9 of S.L. 1985, ch. 29 read: "This act shall be in full force and effect on and after July 1, 1985; provided that notwithstanding the provisions of sections 3, 4, 5 and 6 of this act, it is the intent of the legislature that the provisions of this act, requiring that persons be admitted to the practice of law within this state for at least ten years prior to taking office, shall not apply to justices or judges holding office on the effective date of this act, nor prohibit them from seeking election, re-election or appointment to the office of supreme court justice, court of appeals judge, or district judge, as provided by law."

JUDICIAL DECISIONS

Cited in: Pittam v. Maynard, 103 Idaho 177, 646 P.2d 419 (1982).

1-2103. Removal, disciplining, or retirement of judges or justices — Procedure. — A justice of the Supreme Court or judge of any district court, in accordance with the procedure prescribed in this section, may be disciplined or removed for wilful misconduct in office or wilful and persistent failure to perform his duties or habitual intemperance or conduct prejudicial to the administration of justice that brings judicial office into disrepute, or he may be retired for disability seriously interfering with the performance of his duties, which is, or is likely to become of a permanent character. The judicial council may, after such investigation as the council deems necessary, order a hearing to be held before it concerning the removal, discipline or retirement of a justice or a judge, or the council may in its discretion request the Supreme Court to appoint three (3) special masters, who shall be justices or judges, to hear and take evidence in any such matters, and to report their findings to the council. If, after hearing, or after considering the record and the findings and report of the masters, the council finds good cause therefor, it shall recommend to the Supreme Court the removal, discipline or retirement, as the case may be, of the justice or judge.

The Supreme Court shall review the record of the proceedings on the law and facts and in its discretion may permit the introduction of additional evidence and shall order removal, discipline or retirement, as it finds just and proper, or wholly reject the recommendation. Upon an order for retirement, the justice or judge shall thereby be retired with the same rights and privileges as if he retired pursuant to other provisions of law. Upon an order for removal, the justice or judge shall thereby be removed from office, and his salary shall cease from the date of such order.

All papers filed with and the proceedings before the judicial council or masters appointed by the Supreme Court, pursuant to this section, shall be subject to disclosure according to chapter 3, title 9, Idaho Code, provided, however, that if allegations against a judge are made public by the complainant, judge or third persons, the judicial council may, in its discretion, comment on the existence, nature, and status of any investigation. The filing of papers with and the giving of testimony before the council or the masters shall be privileged; but no other publication of such papers or proceedings shall be privileged in any action for defamation except that (a) the record filed by the council in the Supreme Court continues privileged

and upon such filing loses its confidential character and (b) a writing which was privileged prior to its filing with the council or the masters does not lose such privilege by such filing. The judicial council shall by rule provide for procedures under this section, including the exercise of requisite process and subpoena powers. A justice or judge who is a member of the council or Supreme Court shall not participate in any proceedings involving his own removal, discipline or retirement.

This section is alternative to, and cumulative with, the removal of justices and judges by impeachment, and the original supervisory control of members of the judicial system by the Supreme Court.

History.
1967, ch. 67, § 3, p. 153; am. 1969, ch. 225, § 1, p. 732; am. 1986, ch. 89, § 1, p. 260; am. 1990, ch. 213, § 3, p. 480.

STATUTORY NOTES

Cross References.
Industrial commission, duty to discipline, remove or retire members, § 72-501.

Effective Dates.
Section 111 of S.L. 1990, ch. 213 as amended by § 16 of S.L. 1991, ch. 329 provided that §§ 3 through 45 and 48 through 110 of this act should take effect July 1, 1993 and that §§ 1, 2, 46 and 47 should take effect July 1, 1990.

JUDICIAL DECISIONS

Analysis

Common law.
Evidence.
Procedure.
Substantive due process.

Common Law.
Because there exists a statutory mechanism for removing judges, there is no basis to invoke the superseded common law writ of quo warranto. Parsons v. Beebe, 116 Idaho 551, 777 P.2d 1224 (Ct. App. 1989).

Evidence.
After an independent review of the evidence presented to the judicial council, the supreme court found clear and convincing proof that judge's habitual intemperance, abuse of alcohol, and driving under the influence detracted from public confidence in the integrity of the judiciary. Idaho Judicial Council v. Becker, 122 Idaho 288, 834 P.2d 290 (1992).

Procedure.
While the judicial council fills an important role in the process for considering the discipline, removal, or retirement of judges, the supreme court has the ultimate authority and responsibility to decide what should be done in each case based on a weighing of the evidence presented to the judicial council and any additional evidence the court permits. Idaho Judicial Council v. Becker, 122 Idaho 288, 834 P.2d 290 (1992).

Substantive Due Process.
Statute did not violate substantive due process rights and it satisfied the rational basis test; it required confidentiality only for the limited purpose of allowing the Idaho judicial council to conduct a preliminary investigation into the complaint before determining whether to proceed with a recommendation for discipline. Bradbury v. Idaho Judicial Council, 136 Idaho 63, 28 P.3d 1006 (2001), cert. denied, 534 U.S. 1115, 122 S. Ct. 923, 151 L. Ed. 2d 887 (2002).

Cited in: Pittam v. Maynard, 103 Idaho 177, 646 P.2d 419 (1982); Dalton v. Idaho Dairy Prods. Comm'n, 107 Idaho 6, 684 P.2d 983 (1984); Bradbury v. Idaho Judicial Council, — Idaho —, — P.3d —, 2009 Ida. LEXIS 159 (Sept. 10, 2009).

1-2103A. Removal, disciplining, or retirement of magistrates. — A magistrate of the district court, in accordance with the procedure

prescribed in this section, may be disciplined or removed for wilful misconduct in office or wilful and persistent failure to perform his duties or habitual intemperance or conduct prejudicial to the administration of justice that brings judicial office into disrepute, or he may be recommended for retirement for disability seriously interfering with the performance of his duties, which is, or is likely to become of a permanent character.

The judicial council may, after such investigation as the council deems necessary, order a hearing to be held before it concerning the removal, discipline or retirement of a magistrate, or the council may in its discretion request the Supreme Court to appoint three (3) special masters, who shall be district judges or district magistrates, to hear and take evidence in any such matters, and to report their findings to the council. If, after hearing, or after considering the record and the findings and report of the masters, the council finds good cause therefor, it shall recommend to the Supreme Court the removal, discipline or retirement, as the case may be, of the magistrate.

The Supreme Court shall review the record of the proceedings on the law and facts and in its discretion may permit the introduction of additional evidence and shall order removal or discipline, or recommend retirement for disability, or wholly reject the recommendation. Upon a recommendation for retirement for disability, the recommendation shall be presented to the public employee retirement system for action. Upon an order for removal, the magistrate shall thereby be removed from office, and his salary shall cease from the date of such order.

All papers filed with and the proceedings before the judicial council, or masters appointed by the Supreme Court, pursuant to this section, shall be confidential; provided, however, that if allegations against a magistrate are made public by the complainant, the magistrate, or third person, the judicial council may, in its discretion, comment on the existence, nature and status of any investigation. The filing of papers with and the giving of testimony before the council or the masters shall be privileged, but no other publication of such papers or proceedings shall be privileged in any action for defamation except that (a) the record filed by the council in the Supreme Court continues privileged and upon such filing loses its confidential character; and (b) a writing which was privileged prior to its filing with the council or the masters does not lose such privilege by such filing. The judicial council shall by rule provide for procedures under the provisions of this section including the exercise of requisite process and subpoena powers.

The provisions of this section are alternative to, and cumulative with, the removal of magistrates by impeachment, and the original supervisory control of members of the judicial system by the Supreme Court.

History.
I.C., § 1-2103A, as added by 1990, ch. 71, § 3, p. 152.

STATUTORY NOTES

Cross References.
Public employees retirement system, § 59-301 et seq.

1-2104. Honoraria and expenses of members. — Each member of the judicial council, except a judge, justice or magistrate, shall be compensated as provided by section 59-509(h), Idaho Code.

History.
1967, ch. 67, § 4, p. 153; am. 1980, ch. 247, § 2, p. 582; am. 1985, ch. 76, § 1, p. 150; am. 1990, ch. 71, § 4, p. 152.

CHAPTER 22

MAGISTRATE DIVISION OF THE DISTRICT COURT

1-2201. Magistrate division of district court — Established. — Pursuant to the provisions of section 2 of article V of the Idaho Constitution there is hereby established in each county of the state of Idaho a magistrate division of the district court.

History.
1969, ch. 104, § 1, p. 353.

STATUTORY NOTES

Cross References.
Child protection actions, procedure, Idaho Juvenile Rules 29 to 48.
Juvenile Corrections Act, Idaho Juvenile Rules 2 to 25.

Effective Dates.
Section 17 of S.L. 1969, ch. 104 provided that this act, §§ 1-2201 — 1-2216, should become effective January 11, 1971, except for §§ 1-2203 — 1-2206, 1-2215, which become effective July 1, 1969.

JUDICIAL DECISIONS

Cited in: Parsons v. State, 113 Idaho 421, 745 P.2d 300 (Ct. App. 1987); State v. Fanning, 117 Idaho 655, 791 P.2d 36 (Ct. App. 1990).

1-2202. "Magistrate" defined. — As used in this act "magistrate" means a magistrate of the district court appointed under authority of this act.

History.
1969, ch. 104, § 2, p. 353.

STATUTORY NOTES

Compiler's Notes.
The words "this act" refer to S.L. 1969, ch. 104, compiled as §§ 1-2201 to 1-2216.

1-2203. District magistrates commission — Members. — (1) There is hereby established in each judicial district of the state of Idaho a district magistrates commission to be known as the "district magistrates commission of the .... judicial district," the members of which shall consist of the chairman of the board of county commissioners of each county in the district or member of such board designated by the chairman, the mayors of three (3) municipalities, one (1) of whom shall be from a city of over ten thousand (10,000) population, in the district to be appointed by the governor, two (2) qualified electors residing within the district to be appointed by the governor, the administrative judge of the district or district judge of the district designated by him, two (2) attorneys nominated by the district bar associations in each district and appointed by the Idaho state bar, and a magistrate judge in the district, to be appointed by the administrative district judge. Temporary attorney members may be nominated in such number as the bar association in each district deems appropriate at any time by the respective district bar association and appointed by the Idaho state bar to fill any temporary attorney member vacancy on the district magistrates commissions. Each of the members shall be over the age of majority and shall be and remain a citizen of the United States, a bona fide resident of the state and district and of good moral character.

(2) Forthwith after making any appointments to such commissions the respective appointing authorities shall duly certify in writing to the administrative director of the courts and to the secretary of state the following facts with respect to each appointee:

(a) Full name;

(b) Age;

(c) Residence address;

(d) If employed, the nature of the appointee's occupation and business address;

(e) The name of the district magistrate commission to which appointed;

(f) The date of expiration of term for which appointed;

(g) Except for the initial appointees under this act, the name of the person the appointee succeeds on the commission; and

(h) If a member other than a mayor, magistrate judge or district judge, the appointee's political party.

(3) No member, other than the persons appointed while serving as mayor, county commissioner, magistrate judge or district judge shall hold any city, county or state elective office or be employed by the state or any city or county while a member of the commission.

(4) The two (2) attorney members shall serve for a term of two (2) years and may succeed themselves for two (2) additional terms. The qualified elector members shall serve terms of six (6) years each and may succeed themselves. The mayors shall serve terms of six (6) years and may succeed themselves, provided that their terms will end when they cease to hold the office which entitles them to membership on the commission. The magistrate judge shall serve a two (2) year term which may be renewed up to a total of six (6) years. Appointments to fill vacancies shall be made by the initial appointing authority for the unexpired term.

(5) A vacancy on the commission shall be caused by a voting member dying, resigning, moving his or her residence outside the district, moving his or her residence to another county and, in the case of a mayor, magistrate judge, district judge or county commissioner member, losing his or her status as such official for any reason; provided, however, that except in the case of death or resignation of a member, the member shall continue to serve until a successor is duly appointed and qualified. A vacancy on the commission shall be caused by an attorney member dying, resigning, moving his or her residence to without the district or being suspended or disbarred from the practice of law. A temporary vacancy on the commission shall be caused by an attorney member currently practicing law in the same firm as an applicant seeking a magistrate judge's position in the commission's judicial district, or by an attorney member or a magistrate judge member having been engaged in the practice of law as a partner of such applicant within the last five (5) years. It shall be the duty of any member who has become disqualified for any reason promptly to report that fact in writing to the chairman and secretary of the commission. It shall be the duty of the chairman or secretary promptly to report in writing to the appropriate appointing authority, the existence of any vacancy on the commission.

History.

1969, ch. 104, § 3, p. 353; am. 1972, ch. 359, § 1, p. 1064; am. 1974, ch. 26, § 4, p. 804; am. 1977, ch. 233, § 1, p. 692; am. 1991, ch. 114, § 1, p. 241; am. 1994, ch. 396, § 1, p. 1253; am. 1996, ch. 163, § 1, p. 542; am. 2008, ch. 38, § 1, p. 90.

STATUTORY NOTES

Amendments.

The 2008 amendment, by ch. 38, in the first sentence in subsection (1), deleted "who shall be a nonvoting member" preceding, and "and serve at the pleasure of" following, the third occurrence of "to be appointed by"; in subsection (2)(h), deleted "voting" preceding "member" and inserted "magistrate judge"; in subsection (3), deleted "voting" preceding the first occurrence of "member" and substituted "magistrate judge or district judge" for "and district judge"; in subsection (4), added the fourth sentence; and in subsection (5), inserted "magistrate judge" and deleted "voting" preceding the next-to-last occurrence of "member" in the first sentence and inserted "on the commission" in the third sentence, deleted "having been engaged in the practice of law as a partner of an applicant or" preceding "currently practicing law" and substituted

"in the commission's judicial district, or by an attorney member or a magistrate judge member having been engaged in the practice of law as a partner of such applicant within the last five (5) years" for "in the judicial district of the attorney member" in the third sentence.

Compiler's Notes.

The words "this act," in paragraph (2)(g), refer to S.L. 1969, ch. 104, compiled as §§ 1-2201 to 1-2216.

Effective Dates.

Section 2 of S.L. 1972, ch. 359 declared an emergency. Approved March 31, 1972.

Section 17 of S.L. 1969, ch. 104 provided that this section should become effective July 1, 1969.

1-2204. District magistrates commission — Meetings — Quorum — Officers — Rules. — The district magistrates commission of each judicial district shall meet initially to organize and transact any necessary business on the second Monday of September, 1977, unless earlier convened, and at such other times as shall be necessary in the discharge of its official duties. The commission shall meet at the times and places determined by the commission or by the chairman after reasonable notice. In addition a meeting may be called by any three (3) of the voting members after reasonable notice. A majority of the voting members of the commission shall constitute a quorum. The commission shall act by affirmative vote of a majority of the voting members present. The commission shall elect a vice-chairman to serve until the 30th day of June of the next succeeding year or until a successor is elected. The trial court administrator shall ordinarily serve as secretary of the commission but a member of the commission may be appointed to do so at the discretion of the administrative district judge, or district judge designee. The commission may adopt rules for the administration of its duties not inconsistent with applicable provisions of law. The secretary shall maintain the official minutes of all meetings of actions taken by the commission.

History.

1969, ch. 104, § 4, p. 353; am. 1977, ch. 233, § 2, p. 692; am. 2008, ch. 38, § 2, p. 91.

STATUTORY NOTES

Amendments.

The 2008 amendment, by ch. 38, in the fifth sentence, deleted "and secretary" following "vice chairman" and substituted "until a successor is elected" for "until their successors be elected"; added the sixth sentence; and in the last sentence, deleted "chairman and" preceding "secretary" and "duplicate" preceding "official minutes."

Effective Dates.

Section 17 of S.L. 1969, ch. 104 provided that this section should become effective July 1, 1969.

1-2205. District magistrates commission — Powers and duties. — The district magistrates commission shall have the following powers and duties:

(a) To determine the number and location of magistrate judges to be appointed within the judicial district, subject to appropriations by the legislature, pursuant to section 1-2215, Idaho Code; provided, that there shall be at least one (1) resident magistrate judge appointed in each county, except for those counties in which the board of county commissioners, at any time, has adopted by majority vote, without subsequent rescission, a

resolution waiving the right to a resident magistrate judge, pursuant to section 31-879, Idaho Code;

(b) To appoint the magistrate judges within the district on a nonpartisan merit basis, except as provided in section 1-2220, Idaho Code;

(c) To conduct studies for the improvement of the administration of justice within the district and to make recommendations for improvements therein to the legislature, the supreme court, the district court and such other governmental agencies as may be interested in or affected by such recommendations.

The actions of the commission pursuant to subsections (a) and (b) of this section shall be subject to disapproval by a majority of the district judges in the district within thirty (30) days after written notice to the district judges of the commission's actions, unless such time be extended for good cause by order of the supreme court.

History.

1969, ch. 104, § 5, p. 353; am. 1973, ch. 78, § 1, p. 124; am. 1977, ch. 233, § 3, p. 692; am. 1980, ch. 393, § 1, p. 998; am. 1981, ch. 111, § 1, p. 167; am. 2008, ch. 38, § 3, p. 92.

STATUTORY NOTES

Amendments.

The 2008 amendment, by ch. 38, in subsection (a), substituted "magistrate judges" for "magistrates," twice inserted "judge" following "magistrate" and added "pursuant to section 31-879, Idaho Code"; in subsection (b), substituted "magistrate judges" for "magistrates"; deleted subsection (c), which formerly read: "To recommend to the legislature the salaries to be paid to the magistrates within the district" and redesignated former subsection (d) as subsection (c); and in the last paragraph, substituted "subsections (a) and (b) of this section" for "subsections (a), (b) and (c) hereof."

Effective Dates.

Section 17 of S.L. 1969, ch. 104 provided that this section should become effective July 1, 1969.

JUDICIAL DECISIONS

Magistrates.

Plaintiff's argument that Idaho law required that the judge be subject to an election for retention failed because the statute's plain language was not susceptible of any meaning beyond requiring a magistrate to run for retention in the county for which he was appointed, and not in any or all counties where the magistrate heard cases. Ackerman v. Bonneville County, 140 Idaho 307, 92 P.3d 557 (Ct. App. 2004).

1-2206. Magistrates — Qualifications — Institute — Exceptions — Office appointive. — (1) A magistrate shall be a qualified elector of the state of Idaho. He shall reside in the county for which he is appointed so long as he serves as magistrate.

(2) No person shall be eligible for appointment to the office of magistrate unless he is a graduate of a high school or has attained the equivalent of a high school education as indicated by the possession of a certificate of equivalency issued by the state department of education based upon the record made on the general education development test and unless he shall have attained the age of thirty (30) years prior to taking office, provided that in addition no person shall be eligible for appointment as an attorney magistrate unless prior to taking office he shall have been admitted to the

practice of law for at least five (5) years and is currently licensed to practice law in the state of Idaho.

(3) Magistrates shall not take office for the first time as magistrates until they have attended an institute on the duties and functioning of the magistrate's office to be held under the supervision of the Supreme Court, unless such attendance is waived by the Supreme Court. All magistrates shall be entitled to their actual and necessary expenses while attending institutes. The Supreme Court will establish the institute to which this subsection refers and will provide that the institute be held at such other times and for such other purposes as it deems necessary and may require the attendance of magistrates.

(4) Notwithstanding the provisions of subsection (2) of this section, all magistrates holding office on the effective date of this act shall be eligible for appointment to the office of magistrate and for retention in office pursuant to section 1-2220, Idaho Code.

History.
1969, ch. 104, § 6, p. 353; am. 1979, ch. 149, § 1, p. 460; am. 1982, ch. 217, § 2, p. 590; am. 1982, ch. 298, § 1, p. 760.

STATUTORY NOTES

Amendments.
This section was amended by two 1982 acts which appear to be compatible and have been compiled together.

The 1982 amendment, by ch. 217, added the language following "test" in subsection (2) and added subsection (4).

The 1982 amendment, by ch. 298, in subsection (1), inserted "State of Idaho. He shall reside in the," deleted "and shall reside there" following "appointed," and deleted "except that qualified nonresidents may be appointed as magistrates when no qualified resident elector is available" at the end of the subsection.

Compiler's Notes.
The phrase "effective date of this act," in subsection (4), refers to the effective date of S.L. 1982, ch. 217, which was July 1, 1982.

Section 1 of S.L. 1969, ch. 100, abolished probate courts, justice of the peace courts and police courts as of 12:01 A.M. on January 11, 1971, and provided that where the words "probate court," "justice court" or "police court" appear in the Idaho Code they shall mean the district court or magistrate's division of the district court as the case may be and further provided that where the words "probate judge," "justice of the peace" or "police judge" appear in the Idaho Code they shall mean district judge or magistrate of the district court as the case may be.

Effective Dates.
Section 17 of S.L. 1969, ch. 104 provided that this section should become effective July 1, 1969.

Section 2 of S.L. 1982, ch. 298 declared an emergency. Approved April 1, 1982.

1-2207. Magistrates — Term — Removal — Vacancies. — (1) The term of office of a magistrate shall be four (4) years. The term of office of a magistrate shall begin on the second Monday of January of the odd-numbered year next succeeding his election.

(2) Vacancies in the office of magistrate shall be filled by appointment pursuant to section 1-2205, Idaho Code.

(3) Any magistrate appointed pursuant to section 1-2205, Idaho Code, and subsection (2) of this section, shall exercise the authority of a magistrate from the date of taking office. A magistrate appointed after the effective date of this act may be removed from office within eighteen (18) months of his appointment by majority vote of all the voting members of the district

magistrates commission without cause in accordance with procedures to be established by rules of the Supreme Court.

(4) A magistrate may be removed from office before the expiration of the term to which he was appointed or elected as provided by section 1-2103A, Idaho Code.

History.
1969, ch. 104, § 7, p. 353; am. 1973, ch. 78, § 3, p. 124; am. 1974, ch. 116, § 1, p. 1286; am. 1977, ch. 233, § 4, p. 692; am. 1979, ch. 149, § 2, p. 460; am. 1990, ch. 71, § 5, p. 152.

STATUTORY NOTES

Compiler's Notes.
The phrase "effective date of this act," in subsection (3), refers to the effective date of S.L. 1977, ch. 233, which was July 1, 1977.

1-2208. Assignment of cases to magistrates. — Subject to rules promulgated by the supreme court, the administrative judge in each judicial district or any district judge in the district designated by him may assign to magistrates, severally, or by designation of office, or by class or category of cases, or in specific instances the following matters:

(1) Civil proceedings as follows:

(a) When the amount of money or damages or the value of personal property claimed does not exceed five thousand dollars ($5,000):

(i) Actions for the recovery of money only arising on contracts express or implied; actions for damages for injury to person, property or reputation or for taking or detaining personal property, or for fraud;

(ii) Actions for rent and distress for rent;

(iii) Actions for claim and delivery;

(iv) Proceedings in attachment, garnishment, wage deductions for the benefit of creditors, trial or right of personal property and exemptions, and supplementary proceedings;

(v) Actions arising under the laws for the incorporation of cities or counties or any ordinance passed in pursuance thereof; actions for the confiscation or abatement of nuisances and the seizure, condemnation and forfeiture of personal property; proceedings in respect of estrays and lost property;

(vi) Actions to collect taxes.

(b) Proceedings in forcible entry, forcible detainer, and unlawful detainer; and

(c) Proceedings for the enforcement and foreclosure of common law and statutory liens of not to exceed five thousand dollars ($5,000) on real or personal property.

(2) Proceedings in the probate of wills and administration of estates of decedents, minors and incompetents.

(3) The following criminal and quasi-criminal proceedings:

(a) Misdemeanor and quasi-criminal actions;

(b) Proceedings to prevent the commission of crimes;

(c) Proceedings pertaining to warrants for arrest or for searches and seizures; and

(d) Proceedings for the preliminary examination to determine probable cause, commitment prior to trial or the release on bail of persons charged with criminal offenses.

(4) Any juvenile proceedings except those within the scope of the provisions of section 1-2210, Idaho Code.

(5) Proceedings under the Idaho traffic infractions act, chapter 15, title 49, Idaho Code.

History.

1969, ch. 104, § 8, p. 353; am. 1970, ch. 29, § 1, p. 59; am. 1972, ch. 36, § 1, p. 55; am. 1974, ch. 26, § 5, p. 804; am. 1981, ch. 180, § 1, p. 315; am. 1982, ch. 353, § 5, p. 874; am. 1988, ch. 265, § 559, p. 549; am. 1992, ch. 74, § 1, p. 210; am. 2000, ch. 250, § 1, p. 702; am. 2006, ch. 263, § 1, p. 815.

STATUTORY NOTES

Cross References.

Industrial commission orders and awards, limitation of jurisdiction, § 72-733.

Amendments.

The 2006 amendment, by ch. 263, in subsections (1)(a) and (c), substituted "five thousand dollars" for "four thousand dollars."

Compiler's Notes.

This section was amended by § 7 of S.L. 1981, ch. 223, effective July 1, 1982; however such amendment was repealed by § 3 of S.L. 1982, ch. 353, effective April 2, 1982.

Effective Dates.

Section 2 of S.L. 1970, ch. 29 provided that this act should become effective at 12:01 a.m., January 11, 1971.

JUDICIAL DECISIONS

Analysis

Assignment of felony trial permitted.
Contempt power.
Criminal cases.
Discretion of magistrate.
In general.
Jurisdiction.
Post-conviction proceedings.
Probate and estates.
Youth rehabilitation law.

Assignment of Felony Trial Permitted.

The only aspects of felony cases that are usually assignable to a magistrate are the first appearance, the setting of bail and the preliminary hearing; however, the trial and related hearings with regard to felony proceedings may be assigned to attorney magistrates when approved by the administrative district judge of the district and when approved by order of the supreme court upon application of the administrative district judge. State v. Smith, 117 Idaho 891, 792 P.2d 916 (1990).

Contempt Power.

The attorney magistrate, in conducting habeas corpus proceedings, exercises the judicial power of the state and, in order to vindicate his jurisdiction and proper function, the magistrate is vested with the judicial contempt power; while this power has been recognized by statute (Title 7, chapter 6, Idaho Code), its source lies in the constitution and the common law. Marks v. Vehlow, 105 Idaho 560, 671 P.2d 473 (1983).

Criminal Cases.

A magistrate clearly had jurisdiction to hear a criminal case which had been dismissed after a preliminary hearing and was subsequently refiled. Rufener v. Shaud, 98 Idaho 823, 573 P.2d 142 (1977).

Where no fundamental principle of justice was infringed by the supreme court's appointment of a magistrate as the trial judge, the defendants' due process rights were not violated. McGill v. Lester, 105 Idaho 692, 672 P.2d 570 (Ct. App. 1983), appeal dismissed and cert. denied, 467 U.S., 1247, 104 S. Ct. 3527, 82 L Ed. 2d 834 (1984).

Although the parole commission's decisions are not directly reviewable under the administrative procedures act, because the appeal was from a denial of habeas corpus petition

based on a constitutional challenge, judicial review was available. Therefore the district court, or the magistrate division thereof, had jurisdiction in the habeas corpus proceeding to make a limited review of the commission's decision to revoke defendant's parole. Craig v. State, 123 Idaho 121, 844 P.2d 1371 (Ct. App. 1992).

Discretion of Magistrate.

Where a claim for unlawful detainer was brought before the magistrate and subsequently dismissed upon the magistrate's realization that the parties involved did not have a landlord-tenant relationship, the magistrate's order dismissing the claim, granting leave to file amended complaint, and transferring amended complaint to the district court was properly within the magistrate's discretion. Nationsbanc Mtg. Corp. v. Cazier, 127 Idaho 879, 908 P.2d 572 (Ct. App. 1995), cert. denied, 519 U.S. 864, 117 S. Ct. 172, 136 L. Ed. 2d 113 (1996).

In General.

An attorney magistrate is a judicial officer of the district court whose jurisdiction is established by legislation, under the Idaho constitution, by rule of the Idaho supreme court, and by the rules of the respective district courts. Marks v. Vehlow, 105 Idaho 560, 671 P.2d 473 (1983).

Jurisdiction.

The magistrate court erred in summarily terminating a driver's license suspension proceeding and returning the license to a driver on the ground that the court did not have jurisdiction to proceed on the basis of fact that the affidavit filed by the officer was invalid; with both jurisdiction over the subject matter and personal jurisdiction over the parties, the magistrate court erred when it concluded that "the court does not have jurisdiction to proceed." Hanson v. State, 121 Idaho 507, 826 P.2d 468 (1992).

Magistrate had jurisdiction to entertain a charge against defendant of driving a motor vehicle without a valid license in violation of § 49-301 because that charge was a misdemeanor. State v. Wilder, 138 Idaho 644, 67 P.3d 839 (Ct. App. 2003).

Post-Conviction Proceedings.

Attorney magistrates may be assigned post-conviction proceedings stemming from misdemeanor judgments entered in their courts; furthermore, if there is an objection to the assignment of a case to a magistrate, it must be expressed in writing prior to hearing or trial, or the objection is waived. Parsons v. State, 113 Idaho 421, 745 P.2d 300 (Ct. App. 1987), cert. denied, 116 Idaho 466, 776 P.2d 828 (1988).

Probate and Estates.

Idaho Civil Procedure Rules 82(c)(1) and 82(c)(2) create independent grounds for magistrate jurisdiction — one based upon subject matter and the other based upon the amount in controversy. Clearly the $10,000 value limit of paragraph (A) of Idaho Civil Procedure Rule 82(c)(2) does not apply to the separate conferral upon magistrates of jurisdiction for probate and estate administration proceedings under paragraph (A) of Idaho Civil Procedure Rule 82(c)(1) and subsection (2) of this section. Keeven v. Estate of Keeven, 126 Idaho 290, 882 P.2d 457 (Ct. App. 1994).

The $10,000 value limit of Idaho Civil Procedure Rule 82(c)(2)(A) does not apply to the separate conferral upon magistrates of general jurisdiction for probate and estate administration proceedings under this section. Bingham Mem. Hosp. v. Boyd, 134 Idaho 669, 8 P.3d 664 (Ct. App. 2000).

Trial court and the parties mistakenly believed that the contract establishing the survivor's estate contained provisions relating to the determination of the beneficiary's entitlement, and because there was confusion regarding what expenses, particularly attorney fees, could be deducted from his share, the judge handling the probate was best positioned to determine the net share of any estate beneficiary, considering all expenses, the overall scheme of distribution, and the effect of one beneficiary's entitlement upon that of the others; by following the intent of the applicable statutes and rules pertaining to assignment of probate proceedings to the magistrate division, confusion could be averted or alleviated. Miller v. Estate of Prater, 141 Idaho 208, 108 P.3d 355 (2005).

Youth Rehabilitation Law.

Proceedings under the former youth rehabilitation act (see now § 20-501 et seq.) may be heard by the magistrate's division of the district court only when assignable cases have been assigned to the magistrates by the senior district judge. Hayes v. Gardner, 95 Idaho 137, 504 P.2d 810 (1972).

Cited in: Loomis v. Union P.R.R., 97 Idaho 341, 544 P.2d 299 (1975); State v. Carter, 103 Idaho 917, 655 P.2d 434 (1981); Jonasson v. Gibson, 108 Idaho 459, 700 P.2d 81 (Ct. App. 1985); Carr v. Magistrate Court, 108 Idaho 546, 700 P.2d 949 (1985); Olson v. Kirkham, 111 Idaho 34, 720 P.2d 217 (Ct. App. 1986).

1-2209. Magistrates — Administrative assignments. — Magistrates may be assigned internal administrative functions of the court.

History.
1969, ch. 104, § 9, p. 353.

1-2210. Assignments restricted to magistrates who are attorneys. — (1) The supreme court by rule may specify additional categories of matters assignable to magistrates, except that the following matters may not be assigned to magistrates who are not attorneys:

(a) Civil actions in which the amount of money or damages or the value of property claimed exceeds five thousand dollars ($5,000), except as otherwise authorized by this act;

(b) Criminal proceedings in which the maximum authorized punishment exceeds the punishment authorized for misdemeanors;

(c) All proceedings involving the custody of minors and all habeas corpus proceedings;

(d) Proceedings for divorce, separate maintenance or annulment; and

(e) Proceedings in quo warranto, or for injunction, prohibition, mandamus, ne exeat, or appointment of a receiver.

(2) The supreme court may assign an attorney magistrate to temporary service on the supreme court, except an attorney magistrate may not be assigned to hear cases in which the attorney magistrate participated, nor may an attorney magistrate be assigned to hear cases which originated in his or her judicial district.

History.
1969, ch. 104, § 10, p. 353; am. 1972, ch. 36, § 2, p. 55; am. 1972, ch. 313, § 1, p. 775; am. 1981, ch. 180, § 2, p. 315; am. 1992, ch. 74, § 2, p. 210., I.C., § 1-2210, am. 2000, ch. 250, § 2, p. 702; am. 2002, ch. 95, § 1, p. 263; am. 2006, ch. 263, § 2, p. 815.

STATUTORY NOTES

Amendments.
The 2006 amendment, by ch. 263, substituted "five thousand dollars ($5,000)" for "four thousand dollars ($4,000)" in subsection (1)(a).

Compiler's Notes.
The words "this act," in paragraph (1)(a), refer to S.L. 1969, ch. 104, which is compiled as §§ 1-2201 to 1-2216.

Effective Dates.
Section 3 of S.L. 1972, ch. 36 declared an emergency. Approved February 28, 1972.

Section 2 of S.L. 1972, ch. 313 declared an emergency. Approved March 27, 1972.

JUDICIAL DECISIONS

Analysis

Criminal cases.
Divorce.
Habeas corpus.
Improper assignment.

Criminal Cases.
Where no fundamental principle of justice was infringed by the Idaho supreme court's appointment of a magistrate as the trial judge, the defendants' due process rights were not violated. McGill v. Lester, 105 Idaho 692, 672 P.2d 570 (Ct. App. 1983), appeal dismissed and cert. denied, 467 U.S., 1247, 104 S. Ct. 3527, 82 L Ed. 2d 834 (1984).

Divorce.
Since by virtue of this section and Idaho Civil Procedure Rule 82(c)(2) and a rule of the third judicial circuit, lawyer magistrates had subject matter jurisdiction in divorce action, where after holding a hearing on the matter he found that a common-law marriage existed and ordered defendant to pay alimony pendente lite and attorney fees, district court

erred in issuing writ of prohibition forbidding any further action by the magistrate in the proceedings. Freiburghaus v. Freiburghaus, 100 Idaho 730, 604 P.2d 1209 (1980).

If an attorney magistrate is properly assigned a particular proceeding, he is necessarily assigned all ancillary proceedings incident to the underlying proceeding, regardless of the dollar amount of the controversy involved in the ancillary matters; thus, the assignment of the divorce proceeding to the presiding attorney magistrate carried with it the assignment of all ancillary proceedings to that divorce, including accountings between the parties, arising out of or related to the divorce proceedings. Carr v. Magistrate Court, 108 Idaho 546, 700 P.2d 949 (1985).

Habeas Corpus.

An attorney magistrate may be empowered and clothed with jurisdiction to conduct proceedings in habeas corpus and child custody matters. Marks v. Vehlow, 105 Idaho 560, 671 P.2d 473 (1983).

The attorney magistrate, in conducting habeas corpus proceedings, exercises the judicial power of the state and, in order to vindicate his jurisdiction and power function, the magistrate is vested with the judicial contempt power; while this power has been recognized by statute (Title 7, chapter 6, Idaho Code), its source lies in the constitution and the common law. Marks v. Vehlow, 105 Idaho 560, 671 P.2d 473 (1983).

Improper Assignment.

Where neither party objected to assignment of case to magistrate prior to the beginning of hearing, such failure constituted a statutory waiver of any improper assignment to the magistrate. Carr v. Magistrate Court, 108 Idaho 546, 700 P.2d 949 (1985).

1-2211. Jury trials — Six-man juries. — When required, trial juries shall be selected and summoned as provided in title 2, Idaho Code. In the case of matters enumerated in section 1-2208 tried before a jury whether in district court or in the magistrate's division of district court such jury shall consist of six (6) jurymen, unless the parties agree in open court upon a lesser number.

History.

1969, ch. 104, § 11, p. 353.

1-2212. Record of proceedings — Request for stenographic reporting — Costs. — A verbatim record of the proceedings and evidence at trials before a magistrate shall be maintained either by electrical devices or by stenographic means, as the magistrate may direct, but if any party to the action requests stenographic reporting of the proceedings, the reporting shall be done stenographically. The requesting party shall pay the costs of reporting the proceedings.

History.

1969, ch. 104, § 12, p. 353.

1-2213. Appeals — Powers of district judge. — (1) Appeals from final judgments of the magistrate's division shall be taken and heard in the manner prescribed by law or rule.

(2) Unless otherwise provided by law or rule, a district court judge shall review the case on the record on appeal and affirm, reverse, remand, or modify the judgment; provided, that the district judge in his discretion, may remand the case for a new trial with such instructions as he may deem necessary or he may direct that the case be tried de novo before him.

History.

1969, ch. 104, § 13, p. 353.

JUDICIAL DECISIONS

ANALYSIS

Approval of Accountings.

Until the magistrate approves the administration, distribution and closing of the estate, the approval of accountings by the magistrate is not ripe for review; however, there is no impediment to special review of interlocutory orders approving interim accountings by certification under Idaho Civil Procedure Rule 54(b), concerning the appeal from the magistrate division to the district court, and under Idaho Civil Procedure Rule 54(b) or Idaho Appellate Rule 12, concerning the appeal from the district court to the supreme court. Spencer v. Idaho First Nat'l Bank, 106 Idaho 316, 678 P.2d 108 (Ct. App. 1984).

Denial of Summary Judgment.

Where the district court lacked jurisdiction to hear an appeal from a magistrate's order denying a motion for summary judgment, all subsequent orders entered by the district court based upon the law as established in that proceeding in which the district court acted without jurisdiction would be reversed. State, Dep't of Law Enforcement v. One 1955 Willys Jeep, 100 Idaho 150, 595 P.2d 299 (1979).

District Judge.

In appeal from the magistrate court to the district court, the district judge shall evaluate the record as an appellate court. In re Estate of Stibor, 96 Idaho 162, 525 P.2d 357 (1974).

Error of Magistrate.

The district court erred in affirming magistrate's decision where magistrate ignored portions of testimony and failed to make specific findings of fact in arriving at his order. In re Estate of Stibor, 96 Idaho 162, 525 P.2d 357 (1974).

Evaluation of Evidence.

Where the district court reviewed on the record the decision of the magistrate that a parent-child relationship should be terminated because the father abandoned the child, it was bound by standards of appellate review to determine the factual sufficiency of the record to sustain the magistrate's finding, and it was error for the district court to substitute its evaluation of the evidence for that of the magistrate. In re Matthews, 97 Idaho 99, 540 P.2d 284 (1975).

Remand.

The fact that the district court held a pretrial conference did not limit its discretion to remand case back to the magistrate division for a new trial. Blackadar v. Austin, 121 Idaho 529, 826 P.2d 490 (Ct. App. 1992).

Where the magistrate judge convicted defendant of misdemeanor domestic battery, the district court ruled that the magistrate erred by applying the beyond a reasonable doubt standard to defendant's self-defense claim. The district court, acting its in appellate capacity, had the discretion to remand the case to the magistrate to reconsider the testimony applying the correct burden of proof without ordering a new trial. State v. Jones, 146 Idaho 297, 193 P.3d 457 (Ct. App. 2008).

Reviewing Case as Appeal.

Where original magistrate fell ill following first day of testimony by state on termination of parental rights and second magistrate, hearing case by stipulation of both parties, heard only testimony on behalf of mother, district court's failure to hear case as trial de novo instead of reviewing case as appeal from magistrate level was not error, since counsel of record had implied authority to enter into stipulation and agreements respecting matters of procedure. State, Dep't of Health & Welfare v. Holt, 102 Idaho 44, 625 P.2d 398 (1981).

Reviewing Case on Record.

Where the only issue on appeal was the sufficiency of the evidence, the district court's refusal to observe a video tape taken of defendant several hours after his arrest for driving while under the influence of intoxicating beverages, but electing instead to consider defendant's appeal on the basis of the record made in the magistrates division, was not reversible error, since there was other substantial and competent evidence to sustain the judgment of conviction. State v. Griffith, 97 Idaho 52, 539 P.2d 604 (1975).

Trial De Novo.

Where the magistrate's findings of fact are confused or in conflict, or where findings on a

particular issue are lacking, and resort to the record does not show clearly what findings are correct, the district court ordinarily will not modify the judgment, but will either remand for new findings or, alternatively, conduct a partial or whole trial de novo. Hawkins v. Hawkins, 99 Idaho 785, 589 P.2d 532 (1978).

The district court, having undertaken the task of conducting an appellate review, is not, as a result, precluded from conducting a trial de novo; when circumstances prevent a decisive, complete, or meaningful appellate review, it may be advisable for the district court to augment the trial record or create a new record in order to completely resolve the controversy. Winn v. Winn, 101 Idaho 270, 611 P.2d 1055 (1980).

The district court may conduct an appellate review of a magistrate's decision just as the supreme court would conduct a review of a district court decision, or the district court may choose to wipe the slate clean by ordering a trial de novo and beginning the case anew. Winn v. Winn, 101 Idaho 270, 611 P.2d 1055 (1980).

District court did not err when it ordered a trial de novo after having heard appellate argument, but before issuing an appellate decision. Latham Motors, Inc. v. Phillips, 123 Idaho 689, 851 P.2d 985 (Ct. App. 1993).

Cited in: State v. Wagenius, 99 Idaho 273, 581 P.2d 319 (1978); State v. Mason, 102 Idaho 866, 643 P.2d 78 (1982); State v. Elisondo, 103 Idaho 69, 644 P.2d 992 (Ct. App. 1982); Gilbert v. Moore, 108 Idaho 165, 697 P.2d 1179 (1985); State v. Kenner, 121 Idaho 594, 826 P.2d 1306 (1992); Roe Family Servs. v. Doe (In re Baby Boy Doe), 139 Idaho 930, 88 P.3d 749 (2004).

1-2214. Objections to assignment — Waiver. — All objections to the propriety of an assignment to a magistrate are waived unless made before the trial or hearing begins. No order or judgment is void or subject to collateral [collateral] attack merely because rendered pursuant to improper assignment to a magistrate.

History.
1969, ch. 104, § 14, p. 353.

STATUTORY NOTES

Compiler's Notes.
The bracketed word "collateral" was inserted by the compiler.

JUDICIAL DECISIONS

Analysis

Procedure for objection.
Waiver.

Procedure for Objection.

Attorney magistrates may be assigned post-conviction proceedings stemming from misdemeanor judgments entered in their courts; if there is an objection to the assignment of a case to a magistrate, it must be expressed in writing prior to hearing or trial, or the objection is waived. Parsons v. State, 113 Idaho 421, 745 P.2d 300 (Ct. App. 1987).

Waiver.

Where neither of the parties objected to the supreme court's appointment of a magistrate to sit as a district judge for the purpose of trying their case and neither of the parties objected when the appointed judge later proceeded to try the case and rendered his decision, any procedural objections to the appointment were waived. McGill v. Lester, 105 Idaho 692, 672 P.2d 570 (Ct. App. 1983), appeal dismissed and cert. denied, 467 U.S., 1247, 104 S. Ct. 3527, 82 L Ed. 2d 834 (1984).

Where neither party objected to the assignment of the case to the magistrate prior to the beginning of the hearings, such failure to object constituted a statutory waiver of any improper assignment to the magistrate. Carr v. Magistrate Court, 108 Idaho 546, 700 P.2d 949 (1985).

Cited in: Rudd v. Rudd, 105 Idaho 112, 666 P.2d 639 (1983); State v. Smith, 117 Idaho 891, 792 P.2d 916 (1990).

1-2215. Allocation of appropriation. — The appropriation for the magistrates' divisions of the district courts shall be by separate appropriation to the Supreme Court for such magistrates' divisions, and shall be allocated by the Supreme Court among the judicial districts and for the payment of expenses of magistrates' institutes, from time to time, as may be deemed necessary. Such appropriation shall be used for the payment of salaries and travel and subsistence expenses for magistrates, for the payment of travel and subsistence expenses of district magistrates commissions and for the payment of necessary expenses as may be incurred in holding institutes including travel and subsistence expenses of magistrates and of institute instructors.

History.
1969, ch. 104, § 15, p. 353; am. 1980, ch. 393, § 2, p. 998.

STATUTORY NOTES

Effective Dates.
Section 17 of S.L. 1969, ch. 104 provided that this section should become effective July 1, 1969.

1-2216. Magistrates practicing law. — Attorneys who are magistrates may practice law under such conditions as the district judges sitting en banc in the judicial district may provide, subject to Supreme Court rule.

History.
1969, ch. 104, § 16, p. 353.

STATUTORY NOTES

Effective Dates.
Section 17 of S.L. 1969, ch. 104 provided that §§ 3, 4, 5, 6 and 15 of the act should be in full force and effect from and after July 1, 1969, and the remaining sections of the act should be effective at 12:01 A.M. on January 11, 1971.

1-2217. Facilities and equipment provided by county. — Each county in the state shall provide suitable and adequate quarters for the magistrate's division of the district court, including the facilities and equipment necessary to make the space provided functional for its intended use, and shall provide for the staff personnel, supplies, and other expenses of the magistrate's division.

History.
1969, ch. 121, § 1, p. 381.

JUDICIAL DECISIONS

Payments by City.
While district court had statutory authority to order cities to provide facilities, equipment, and personnel for their own magistrate's offices, it did not have the authority to order cities to make pro rata contributions to support the cost of operating county magistrate's office used by cities. An alternate form of cost-sharing existed in the statutory scheme for portions of court fees to be diverted to the county providing the magistrate's office. Twin Falls County v. City of Twin Falls (In re Idaho Code 1-2218), 143 Idaho 398, 146 P.3d 664 (2006).

City did not meet its burden to show good and sufficient cause for setting aside a § 1-2218 order from 1980, requiring the city to provide facilities for a magistrate division of the district court. While *Twin Falls County v. Cities of Twin Falls and Filer*, 143 Idaho 398, 146 P.3d 664 (2006), precluded the district judges from ordering a city to reimburse a county for use of county-owned facilities, the decision did not absolve the city of its reponsibilities under the order. Additionally, the construction of a new county courthouse and the fact that the city voluntarily transferred its rights to all fees collected under § 31-3201A to the county did not relieve the city of its responsibilities under the order. City of Boise v. Ada County (In re Facilities & Equip. Provided by the City of Boise), 147 Idaho 794, 215 P.3d 514 (2009).

OPINIONS OF ATTORNEY GENERAL

The staff personnel provided by the county or city are not given specific statutory authorization to perform any of the functions of court attendants, nor are they recognized as peace officers; thus, they are not competent to perform the full range of security functions of court attendants. OAG 87-3.

1-2218. Facilities and equipment provided by city. — Any city in the state shall, upon order of a majority of the district judges in the judicial district, provide suitable and adequate quarters for a magistrate's division of the district court, including the facilities and equipment necessary to make the space provided functional for its intended use, and shall provide for the staff personnel, supplies, and other expenses of the magistrate's division.

History.
1969, ch. 121, § 2, p. 381.

JUDICIAL DECISIONS

Analysis

Action on order.
Burden of proof.
Continuing responsibility.
Payments to county.
Scope of order.

Action on Order.

Although a proceeding brought by a city to set aside an order issued pursuant to this section, which obligated the city to provde facilities for a magistrate division of the district court, was not truly a civil action, the district judges have an inherent power, codified in § 1-1622, to consider the standards in Idaho R. Civ. P. 24(a) and allow a county which would be adversely affected by the set aside, to intervene. City of Boise v. Ada County (In re Facilities & Equip. Provided by the City of Boise), 147 Idaho 794, 215 P.3d 514 (2009).

Burden of Proof.

In an action to set aside an order issued pursuant to this section, a city has the burden to show good and sufficient cause, which may be satisfied by demonstrating that the order is no longer justified because of either a change in the law or a change in the factual circumstances. City of Boise v. Ada County (In re Facilities & Equip. Provided by the City of Boise), 147 Idaho 794, 215 P.3d 514 (2009).

Continuing Responsibility.

City did not meet its burden to show good and sufficient cause for setting aside an order under this section from 1980, requiring the city to provide facilities for a magistrate division of the district court. While *Twin Falls County v. Cities of Twin Falls and Filer*, 143 Idaho 398, 146 P.3d 664 (2006), precluded the district judges from ordering a city to reimburse a county for use of county-owned facilities, the decision did not absolve the city of its reponsibilities under the order. Additionally, the construction of a new county courthouse and the fact that the city voluntarily transferred its rights to all fees collected under § 31-3201A to the county did not relieve the city of its responsibilities under the order. City of Boise v. Ada County (In re

Facilities & Equip. Provided by the City of Boise), 147 Idaho 794, 215 P.3d 514 (2009).

Payments to County.

While district court had statutory authority to order cities to provide facilities, equipment, and personnel for their own magistrate's offices, it did not have the authority to order cities to make pro rata contributions to support the cost of operating county magistrate's office used by cities. An alternate form of cost-sharing existed in the statutory scheme for portions of court fees to be diverted to the county providing the magistrate's office. Twin Falls County v. City of Twin Falls (In re Idaho Code 1-2218), 143 Idaho 398, 146 P.3d 664 (2006).

Scope of Order.

An order issued by a district court under this section, requiring a city to provide suitable and adequate quarters for a magistrate division of the district court, did not impose a tax or raise general revenue and, thus, did not implicate the prohibition in Idaho Const. art. VII, § 5 against duplicative and non-uniform taxes. City of Boise v. Ada County (In re Facilities & Equip. Provided by the City of Boise), 147 Idaho 794, 215 P.3d 514 (2009).

OPINIONS OF ATTORNEY GENERAL

The staff personnel provided by the county or city are not given specific statutory authorization to perform any of the functions of court attendants, nor are they recognized as peace officers; thus, they are not competent to perform the full range of security functions of court attendants. OAG 87-3.

1-2219. Magistrates — Salaries and travel expenses. — The state shall provide for the salaries and travel expenses of the magistrates of the district court.

History.

1969, ch. 121, § 3, p. 381.

STATUTORY NOTES

Effective Dates.

Section 4 of S.L. 1969, ch. 121 provided that the act should be effective at 12:01 A.M. on January 11, 1971.

1-2220. Retention or nonretention of magistrate by vote. — Any magistrate appointed pursuant to the provisions of section 1-2205, Idaho Code, and section 1-2207(2), Idaho Code, shall stand for office in the first general election next succeeding the expiration of the eighteen (18) month period established pursuant to section 1-2207, Idaho Code. Any magistrate may, not less than ninety (90) days prior to the holding of the general election next preceding the expiration of his term of office, file in the office of the county clerk of the county for which he is a resident magistrate, accompanied by a filing fee of forty dollars ($40.00), a declaration of candidacy to succeed himself. If a declaration is not so filed by any magistrate, the vacancy resulting from the expiration of his term of office shall be filled by appointment as herein provided, except that any magistrate who does not file shall be ineligible for appointment within the same judicial district until two (2) years following the expiration of his last term of office have expired. If such a declaration is filed, his name shall be submitted at the next general election to the voters eligible to vote within the county for which he is appointed, on a nonpartisan judicial ballot, without party designation, which shall read:

"Shall Magistrate .... (Here insert the name of the magistrate) of .... (Here insert the name of the county) County of the .... (Here insert the

judicial district number) Judicial District be retained in office?" (Here provision is to be made for voting "Yes" or "No.")

The votes shall be canvassed as provided in chapter 12, title 34, Idaho Code.

If a majority of those voting on the question vote against retaining him in office, upon the expiration of his term of office, a vacancy shall exist which shall be filled by appointment as provided in section 1-2205, Idaho Code, except that the magistrate not retained in office shall be ineligible for appointment within the same judicial district until two (2) years following the expiration of his last term of office have expired.

If a majority of those voting on the question vote for retaining him in office, the county clerk shall issue him a certificate of election as provided in section 34-1209, Idaho Code, and said magistrate shall, unless removed for cause, remain in office for an additional term of four (4) years, and at the expiration of each such four (4) year term shall be eligible for retention in office by election in the manner herein prescribed.

History.
I.C., § 1-2220, as added by 1973, ch. 78, § 2, p. 124; am. 1974, ch. 116, § 2, p. 1286; am. 1977, ch. 233, § 5, p. 692; am. 1979, ch. 149, § 3, p. 460; am. 2003, ch. 55, § 1, p. 199.

STATUTORY NOTES

Compiler's Notes.
The words enclosed in parentheses so appeared in the law as enacted.

JUDICIAL DECISIONS

Voting on Magistrates.
Plaintiff's argument that Idaho law required that the judge be subject to an election for retention failed because the statute's plain language was not susceptible of any meaning beyond requiring a magistrate to run for retention in the county for which he was appointed, and not in any or all counties where the magistrate heard cases. Ackerman v. Bonneville County, 140 Idaho 307, 92 P.3d 557 (Ct. App. 2004).

1-2220A. Reporting of campaign contributions and expenditures — Magistrate retention elections. — The provisions of sections 67-6601 through 67-6616, Idaho Code, and sections 67-6623 through 67-6630, Idaho Code, insofar as they relate to the reporting of campaign contributions and expenditures, are hereby made applicable to all magistrate retention elections except that, with the exception of section 67-6623(f), Idaho Code, the clerk of the district court shall stand in place of the secretary of state as it relates to the provisions cited in this section.

History.
I.C., § 1-2220A, as added by 2001, ch. 291, § 1, p. 1028; am. 2005, ch. 254, § 6, p. 777.

1-2221. Senior judge — Assignment — Duties and powers — Compensation and expenses — Qualifications and oath. — (1) A magistrate judge who leaves office or retires from the magistrates division of

a district court, except a magistrate judge retired under the provisions of section 59-1352, Idaho Code, may be designated a senior judge of the state of Idaho by the supreme court.

(2) Upon filing with the secretary of state an oath of office as a senior judge as prescribed in subsection (7) of this section, a senior judge is eligible for temporary assignment, with the consent of the senior judge, by the supreme court to a state court as provided in this subsection, whenever the supreme court determines that the assignment is reasonably necessary and will promote the more efficient administration of justice. A senior judge may sit as a judge of the district court of any county or may sit with the supreme court or court of appeals or may perform such other duties pertaining to the judicial department of government as may be requested.

(3) The assignment of a senior judge shall be made by an order which shall designate the court or duties to which the senior judge is assigned and the duration of the assignment. Promptly after assignment of a senior judge under this section, the supreme court shall cause a certified copy of the order to be sent to the senior judge and another certified copy to the court to which the senior judge is assigned.

(4) Each senior judge assigned as provided in this section has all the judicial powers and duties, while serving under the assignment, of a regularly qualified judge of the court to which the senior judge is assigned.

(5) A senior judge assigned as provided in this section shall receive as compensation for each day the senior judge is actually engaged in the performance of duties under the assignment an amount equal to eighty-five percent (85%) of the daily salary of an active magistrate judge. However, a retired magistrate judge shall not receive for services as a senior judge during any fiscal year a sum of money which when added to the amount of any judicial retirement pay received by the senior judge for the year exceeds the current annual salary of an active magistrate judge; except that this limitation shall not apply if the chief justice of the supreme court determines that extended service by one (1) or more senior judges is required because of extraordinary circumstances, such as a natural disaster or a judge's absence from service due to military service or medical disability. Services by a senior judge under an assignment and receipt of compensation for services shall not reduce or otherwise affect the amount of any retirement pay to which the senior judge otherwise would be entitled. Such additional compensation above the retirement compensation benefits accruing to such senior judge shall be paid from the general fund in accordance with appropriations provided by the legislature.

(6) A senior judge assigned to a court located outside the county in which the senior judge regularly resides shall receive, in addition to any daily compensation, reimbursement for traveling and subsistence expenses necessarily incurred in the performance of duties under the assignment. The expenses shall be paid upon presentation of an itemized statement of the expenses, certified by the senior judge to be correct.

(7) To be eligible for assignment, a senior judge must: maintain a residence within the state; not engage in the practice of law other than as a mediator or arbitrator or similar alternate dispute resolution function; not

accept a position in another branch of state government or any political subdivision; not accept a position in the government of the United States or of another state or nation; and take, subscribe and file with the secretary of state, the following oath or affirmation:

"I, ..., do solemnly swear (or affirm, as the case may be) that as a senior judge of the state of Idaho, I will support the Constitution of the United States and the Constitution of the State of Idaho, and that upon hereafter accepting any assignment to serve as a senior judge of a court of this state I will faithfully discharge the duties thereof to the best of my ability.".

(8) Any period of service rendered by a senior judge shall not in any way be computed for additional retirement benefits, and the state controller shall not receive or deduct any sum for transfer to the public employee retirement system of Idaho.

History.
I.C., § 1-2221, as added by 2000, ch. 385, § 9, p. 1248; am. 2005, ch. 188, § 2, p. 574.

STATUTORY NOTES

Cross References.
Public employees retirement system, § 59-1301 et seq.

Prior Laws.
Former § 1-2221, which comprised I.C., § 1-2221, as added by 1975, ch. 25, § 1, p. 40; am. 1993, ch. 82, § 1, p. 212; am. 1994, ch. 180, § 6, p. 420., was repealed by S.L. 2000, ch. 385, § 8, effective January 1, 2000.

Compiler's Notes.
The words enclosed in parentheses so appeared in the law as enacted.

1-2222. Salary schedule — Attorney and nonattorney magistrates. — The salaries of magistrates of the district court shall be as follows:

(1) Beginning on July 1, 1998, the annual salary of each magistrate who is an attorney shall be seven thousand eight hundred eight dollars ($7,808) less than the annual salary of a district judge. Beginning on July 1, 1999, the annual salary of each magistrate who is an attorney shall be seven thousand one hundred six dollars ($7,106) less than the salary of a district judge. Beginning on July 1, 2000, the annual salary of each magistrate who is an attorney shall be six thousand four hundred four dollars ($6,404) less than the salary of a district judge. Beginning on July 1, 2001, the annual salary of each magistrate who is an attorney shall be five thousand seven hundred two dollars ($5,702) less than the salary of a district judge. Beginning July 1, 2002, the annual salary of each magistrate who is an attorney shall be five thousand dollars ($5,000) less than the salary of a district judge.

(2) Beginning July 1, 1998, the following schedule is adopted as the base annual salary schedule for all nonattorney magistrates:

STATE OF IDAHO
BASE ANNUAL SALARY SCHEDULE FOR NONATTORNEY MAGISTRATES

Pay Class	Annual Case Dispositions	Annual Salary
Nonattorney Magistrate Judge I	more than 4,500 cases	$46,222
Nonattorney Magistrate Judge II	3,000 to 4,500 cases	41,663
Nonattorney Magistrate Judge III	1,750 to 3,000 cases	37,105
Nonattorney Magistrate Judge IV	under 1,750 cases	31,027

Commencing on July 1, 1999, the amount of the base annual salary for all nonattorney magistrates shall be increased by four percent (4%), and again commencing on July 1, 2000, the amount of the base annual salary for all nonattorney magistrates shall be increased by three and one-half percent (3 1/2%), and again commencing on July 1, 2001, the amount of the base annual salary for all nonattorney magistrates shall be increased by four and one-half percent (4 1/2%), and again commencing on July 1, 2004, the amount of the base annual salary for all nonattorney magistrates shall be increased by two percent (2%).

(3) The administrative director of the courts shall certify annually the case dispositions of each nonattorney magistrate judge and designate the salary classification for each nonattorney magistrate prior to the beginning of each fiscal year. Any increases or decreases in salary as a result of the provisions of this section shall become effective to coincide with the start of the fiscal year.

(4) Each nonattorney magistrate shall, separate and apart from the salary schedule established by subsection (2) of this section, receive an additional seven hundred fifty dollar ($750) longevity increment added to his base salary for each complete five (5) year period of service as a magistrate. No additional longevity increment shall be awarded after the twentieth year of service. For purposes of this subsection, magistrates who entered state service on January 11, 1971, shall receive credit for years of service as a police court judge, city court judge, justice of the peace, or probate judge.

(5) Each nonattorney magistrate shall, separate and apart from the salary schedule established by subsection (2) of this section, and separate and apart from the longevity increment established by subsection (4) of this section, receive an additional jurisdiction credit of thirty percent (30%) of his base salary upon being granted full statutory jurisdiction by the supreme court.

(6) Regardless of any other provision of this section, beginning July 1, 1997, no nonattorney magistrate shall receive an annual salary of more than fifty-five thousand two hundred seventy-six dollars ($55,276), and

beginning July 1, 1998, there shall be no maximum salary limitation on nonattorney magistrate salaries.

(7) All nonattorney magistrates are full-time state officers, are required to be available on a twenty-four (24) hour basis to perform duties incident to their office such as the issuance of search and arrest warrants, and are required to hold such office hours as may be necessary to conduct court business or as required by the supreme court.

(8) For the fiscal year commencing July 1, 2005, and ending June 30, 2006, only, the salaries of magistrates shall be temporarily increased by one percent (1%) if the state controller certifies to the secretary of state that the unexpended and unencumbered balance of the general fund on June 30, 2005, exceeded $124,000,000.

History.

I.C., § 1-2222, as added by 1982, ch. 217, § 1, p. 590; am. 1984, ch. 22, § 6, p. 25; am. 1985, ch. 29, § 4, p. 52; am. 1988, ch. 23, § 1, p. 25; am. 1990, ch. 39, § 1, p. 59; am. 1993, ch. 217, § 1, p. 680; am. 1996, ch. 257, § 1, p. 841; am. 1997, ch. 67, § 1, p. 141; am. 1998, ch. 93, § 1, p. 338; am. 1999, ch. 250, § 1, p. 648; am. 2000, ch. 386, § 1, p. 1258; am. 2001, ch. 309, § 1, p. 1115; am. 2004, ch. 306, § 1, p. 855; am. 2005, ch. 399, § 3, p. 1361.

STATUTORY NOTES

Effective Dates.

Section 8 of S.L. 1984, ch. 22 declared an emergency and provided that the act should take effect on March 1, 1984. Approved February 29, 1984.

Section 9 of S.L. 1985, ch. 29 read: "This act shall be in full force and effect on and after July 1, 1985; provided that notwithstanding the provisions of sections 3, 4, 5 and 6 of this act, it is the intent of the legislature that the provisions of this act requiring that persons be admitted to the practice of law within this state for at least ten years prior to taking office, shall not apply to justices or judges holding office on the effective date of this act, nor prohibit them from seeking election, re-election or appointment to the office of supreme court justice, court of appeals judge, or district judge, as provided by law."

1-2223. Magistrate judges handling juvenile delinquency cases. — (1) Each magistrate judge in a judicial district who is assigned juvenile delinquency matters shall receive instruction in a course designed for training of judges of juvenile courts.

(2) Each magistrate judge to whom this section applies shall attend instruction provided when it is offered for the first time after his appointment, election or assignment, unless he is excused by written order of the supreme court.

(3) The administrative director of the courts shall arrange for giving appropriate instruction to magistrate judges as required by the provisions of this section.

History.

I.C., § 1-2223, as added by 1989, ch. 155, § 16, p. 371; am. 1991, ch. 98, § 1, p. 217.

STATUTORY NOTES

Effective Dates.

Section 21 of S.L. 1989, ch. 155 provided that the act should take effect January 15, 1990.

1-2224. Senior magistrate judges fund. — (1) There is hereby created in the office of the state treasurer, separate and apart from other funds of the state, a dedicated fund to be known as the senior magistrate judges fund. Moneys deposited into the fund pursuant to section 31-3201A, Idaho Code, shall, subject to appropriation, be used by the Idaho supreme court to purchase up to a maximum of forty-eight (48) months of membership service in the public employee retirement system of Idaho under section 59-1363, Idaho Code, for retiring magistrate judges of the district court who hold office under the provisions of chapter 22, title 1, Idaho Code, at the time of their retirement. The supreme court's purchase of membership service in the public employee retirement system of Idaho under this section shall also be restricted by any applicable limits and requirements established by the public employee retirement system of Idaho and by the United States internal revenue service.

(2) The actual number of months of membership service the supreme court may purchase on behalf of a person shall be based upon the period of full-time service provided to the judicial department by that person prior to retirement and the person's willingness to perform service as a senior judge if he or she is designated a senior judge by the supreme court pursuant to section 1-2005 or 1-2221, Idaho Code.

(3) The supreme court may adopt rules for the application and implementation of subsections (1) and (2) of this section including, but not limited to, establishing eligibility requirements and a formula, criteria and procedures for determining the number of months of membership service the court will purchase on behalf of a person.

(4) Moneys deposited into the fund may be allowed to accumulate from year to year for the purposes set forth in this section, and all interest earned on the investment of idle moneys in the fund by the state treasurer shall be returned to the fund.

History.
I.C., § 1-2224, as added by 2006, ch. 267, § 1, p. 828.

STATUTORY NOTES

Cross References.
Public employees retirement system, § 59-1301 et seq.

Effective Dates.
Section 3 of S.L. 2006, ch. 267 provided that the act should take effect on and after July 1, 2006, and shall apply only to full-time magistrate judges who retire on or after July 1, 2006.

CHAPTER 23

SMALL CLAIMS DEPARTMENT OF THE MAGISTRATE DIVISION

1-2301. Small claims department — Creation — Scope of claims — Venue. — In every magistrate's division of the district court of this state, the district court may create and organize a "Small Claims Department of the Magistrate's Division," which shall have jurisdiction in cases for the recovery of money where the amount of each claim does not exceed five thousand dollars ($5,000), and in cases for the recovery of personal property where the value of the property does not exceed five thousand dollars ($5,000); provided however, that the small claims department shall not award punitive damages or damages for pain or suffering in any proceeding. Any action brought in a small claims department of the magistrate's division shall be brought in the magistrate's division in the county where the defendant resides or the county where the cause of action arose. A defendant may request a change of venue if an action is brought in an improper county.

History.

1969, ch. 103, § 1, p. 348; am. 1973, ch. 42, § 1, p. 78; am. 1976, ch. 125, § 1, p. 474; am. 1978, ch. 365, § 1, p. 954; am. 1981, ch. 180, § 3, p. 315; am. 1983, ch. 192, § 1, p. 521; am. 1984, ch. 199, § 1, p. 488; am. 1992, ch. 74, § 3, p. 210; am. 1995, ch. 183, § 1, p. 669, I.C., § 1-2301, am. 2000, ch. 250, § 3, p. 702; am. 2002, ch. 74, § 1, p. 163; am. 2006, ch. 263, § 3, p. 815.

STATUTORY NOTES

Amendments.

The 2006 amendment, by ch. 263, twice substituted "five thousand dollars ($5,000)" for "four thousand dollars ($4,000)."

Effective Dates.

Section 16 of S.L. 1969, ch. 103 provided that this act, enacting §§ 1-2301 — 1-2315, should become effective January 11, 1971.

Section 2 of S.L. 2002, ch. 74 declared an emergency. Approved March 11, 2002.

JUDICIAL DECISIONS

Corporations.

Since a corporation is a person with the ordinary rights of a person, county hospital was not barred from suing in the small claims department because it is not a natural person. Bissett v. Unnamed Members of Political Compact, 111 Idaho 863, 727 P.2d 1291 (Ct. App. 1986).

1-2301A. Drawing check without funds or insufficient funds — Civil liability. — In any action filed in the small claims department against a person who makes any check, draft or order for the payment of money which has been dishonored for lack of funds or credit to pay the same, or because the maker has no account with the drawee, the plaintiff, or a collection agency with a license issued to it pursuant to section 26-2225,

Idaho Code, which is attempting to collect the dishonored check under a written agreement with the payee or holder of the check, may recover from the defendant the amount of the check, draft or order and, in addition thereto, the greater of the amount of one hundred dollars ($100) or three (3) times the amount for which the check, draft or order is drawn. Except as provided in section 1-2304, Idaho Code, the plaintiff or collection agency may recover no other costs, fees, charges or damages. However, damages recovered under the provisions of this section shall not exceed by more than five hundred dollars ($500) the value of the check, draft or order and may be awarded only if the plaintiff made written demand of the defendant for payment of the amount of the check, draft or order not less than ten (10) days before commencing the action, and if the defendant failed to tender to the plaintiff, prior to commencement of the action, an amount of money not less than the amount demanded. The written demand required by this section shall be sent to the maker by certified mail at his last known address, or by regular mail, supported by an affidavit of service by mailing, to the address printed or written on the check as provided in section 28-22-106, Idaho Code, in which case the demand shall be deemed conclusive three (3) days following the date the affidavit is executed. The written demand shall fully advise the maker of the check, draft, or order of the consequences of failure to make prompt payment under this section. The plaintiff or collection agency must show proof of service by producing a copy of a signed return receipt or affidavit of personal service.

History.

I.C., § 18-3107, as added by 1982, ch. 156, § 1, p. 422; redesig. 1983, ch. 192, § 2, p. 521; am. 1996, ch. 373, § 1, p. 1269; am. 1999, ch. 115, § 1, p. 348; am. 2001, ch. 22, § 1, p. 28; am. 2002, ch. 288, § 1, p. 833; am. 2008, ch. 347, § 32, p. 958.

STATUTORY NOTES

Cross References.

Dishonor of check by nonacceptance or nonpayment, liability for interest, costs and attorney's fees, § 28-22-105.

Dishonor of negotiable instruments, § 28-3-501 et seq,

Theft, § 18-2401 et seq.

Compiler's Notes.

This section, which was formerly compiled as § 18-3107, was amended and redesignated by S.L. 1983, ch. 192, § 2 as this section.

Amendments.

The 2008 amendment, by ch. 347, in the first sentence, substituted "license issued" for "permit issued" and updated the section reference in light of 2008 legislation.

JUDICIAL DECISIONS

Bankruptcy Code.

Debtor was convicted of passing bad checks arising out of a purchase by debtor of cattle from the other party to the transaction. The state criminal court placed debtor on probation and ordered that he pay other party restitution. Several months later debtor and his wife filed for Chapter 7 bankruptcy relief. Under applicable state law, other party held a claim against debtor based on the dishonor of the checks independent from any obligation created via the criminal prosecution. Accordingly, the court found that the defendant was a creditor of debtor at the time of its receipt of the restitution payments, and that those payments were avoidable by the bankruptcy trustee under the Bankruptcy Code. Zimmerman v. Itano Farms, Inc. (In re Currey), 144 Bankr. 490 (Bankr. D. Idaho 1992).

Where defendant admitted to the state court in a prosecution under § 18-3106 that

he delivered checks to plaintiff knowing that he did not have the funds on deposit to cover the checks and that he did so wilfully and with the intent to defraud plaintiff, such findings supported a claim in favor of plaintiff over defendant under this section for the amount of the checks and, in addition supported a finding that the indebtedness created thereby was exempted from defendant's discharge under the federal Bankruptcy Code. Itano Farms, Inc. v. Currey, 154 Bankr. 977 (Bankr. D. Idaho 1993).

OPINIONS OF ATTORNEY GENERAL

A creditor cannot threaten a debtor with criminal penalties if the debtor fails to pay a bad check. OAG 84-6.

A suit under this section precludes imposition of attorneys' fees, interest on the check for the period before the date of judgment, and collection costs; this section allows recovery only of the amount of the check and treble damages. OAG 84-6.

If the drawer pays the check during the required notice time, he can never be obligated to pay more than the face amount; however, under a former section, the notice was posted at the point of sale and the creditor was not required to mail a notice of dishonor. In such a case, the drawer may be obligated to pay the noticed amount of the collection fee. OAG 84-6.

In a suit under this section, a judge has discretion to reduce the amount of treble damages if the statutory requirements of suit have been met. OAG 84-6.

Since this section is a small claims court remedy, its use is restricted to actions by the owners of checks; however, an owner could sue under this section and then turn the judgment over to a collection agency or attorney for collection. OAG 84-6.

The conclusion that the use of this section is limited to small claims court is compelled by evidence that such is the legislative intent as revealed by the legislative history, the desire to avoid harsh results, comparison with other statutes and sections, policy grounds, social and economic consequences, the placement of the statute, its heading, and other principles of statutory construction. OAG 84-6.

This section appears designed to give the holder of a dishonored check an incentive to collect on the check himself without having to employ an attorney, thereby allowing the holder to get treble damages in lieu of attorneys' fees. OAG 84-6.

When a creditor has violated provisions of this section or a former section in title 28, a debtor may refuse to pay more than he is obligated to pay and may bring suit to recover any amounts wrongfully collected by a holder. OAG 84-6.

1-2302. Commencement of actions. — Actions in such small claims department shall be deemed commenced by the plaintiff subscribing to, verifying and filing a claim as hereinafter provided.

History.
1969, ch. 103, § 2, p. 348.

1-2303. Filing of claim — Default. — Upon filing a claim, the clerk shall furnish to the plaintiff a form of answer and instructions to the defendant, which, among other matters shall advise the defendant that if the defendant desires to have a hearing on the matter, the defendant must sign, complete and file the answer with the clerk. The instructions also shall notify the defendant that if the defendant does not sign and file the answer within twenty (20) days from the date of service on the defendant, judgment will be entered as requested in the claim.

If no answer is filed within twenty (20) days, judgment may be entered by the court as provided in Rule 55, I.R.C.P. If an answer is filed by the defendant, the court shall set the matter for trial or mediation, by notice mailed to each party.

The court shall collect in advance upon each claim the sum of thirteen dollars ($13.00), which shall be in addition to the costs necessary to effect service of the claim upon the defendant. This fee shall be distributed as

follows: seven dollars ($7.00) shall be paid to the county treasurer for deposit in the district court fund of the county and six dollars ($6.00) shall be paid to the county treasurer who shall, within five (5) days after the end of the month, pay such fee to the state treasurer for deposit in the senior magistrate judges fund.

History.
I.C., § 1-2303, am. 2000, ch. 250, § 5, p. 702; am. 2009, ch. 80, § 1, p. 221.

STATUTORY NOTES

Cross References.
District court fund, § 31-867.
Senior magistrate judges fund, § 1-2224.

Prior Laws.
Former § 1-2303, which comprised 1969, ch. 103, § 3, p. 348; am. 1979, ch. 219, § 5, p. 607, was repealed by S.L. 2000, ch. 250, § 4, effective January 1, 2001.

Amendments.
The 2009 amendment, by ch. 80, rewrote the last paragraph, which formerly read: "The court shall collect in advance upon each claim the sum of seven dollars ($7.00), which shall be in addition to the costs necessary to effect service of the claim upon the defendant, and which shall be paid to the county treasurer for deposit in the district court fund of the county."

1-2304. Service of process — Service by mail. — (1) A summons, copy of the claim, form of answer and instructions to defendant shall be served upon the defendant by personal service in the manner provided by law, or when a request is made therefor by the plaintiff, service of process may be made upon the defendant by mail, as herein provided.

(2) The plaintiff may request service upon the defendant by mail by endorsing his request in writing upon the claim, which request shall include the address to be used in mailing. The court shall mail to the defendant at the address given in the endorsement a summons, copy of the claim, form of answer and instructions to the defendant. Service of process by mail shall be made by registered or certified mail, return receipt requested, and shall be complete upon the return of the receipt signed by the defendant to the court. The signature of the defendant on the return receipt shall constitute prima facie proof of service by mail. The plaintiff shall bear the cost of service of process by mail.

(3) The costs to plaintiff for personal service of process on the defendant, in addition to the filing fee provided in section 1-2303, Idaho Code, shall be added to any judgment for the plaintiff.

History.
I.C., § 1-2304, as added by 2000, ch. 250, § 6, p. 702.

STATUTORY NOTES

Prior Laws.
Former § 1-2304, which comprised 1969, ch. 103, § 4, p. 348; am. 1999, ch. 115, § 2, p. 348, was repealed by S.L. 2000, ch. 250, § 4, effective January 1, 2001.

JUDICIAL DECISIONS

DECISIONS UNDER PRIOR LAW

Award of Fee.

District court erred by including the $17.50 small claims filing fee as part of the award of costs allowed on appeal pursuant to Idaho Civil Procedure Rule 81(p), as the fee for filing the small claims action, which the magistrate awarded in the small claims trial, was not a cost on appeal, and plaintiff respondent was, therefore, entitled to the additional $17.50 awarded by the magistrate; hence the judgment would be modified to add $17.50 costs to respondent's award. Huff v. Uhl, 103 Idaho 274, 647 P.2d 730 (1982).

1-2305. Contents of claim. — The claim shall contain the name of the plaintiff and the name of the defendant, followed by a statement, in brief and concise form, of the nature and amount of the claim and the time the claim accrued, and shall also state the address of the defendant, if known to the plaintiff.

History.

1969, ch. 103, § 5, p. 348, am. 2000, ch. 250, § 7, p. 702.

1-2306. Actions by or against state or local government officials or agencies. — (1) Except as specifically provided in this subsection, the state of Idaho, any state agency, any political subdivision of the state of Idaho, city, county, taxing district, or public corporation, along with any official and employee thereof acting within their official capacity may be a party plaintiff or defendant in any small claims action otherwise allowed by law. Any state agency or other governmental entity which is a party to a small claims action may appear as provided in subsection (2) of this section. The governmental agency or entity may not appear through the office of the attorney general, notwithstanding the provisions of section 67-1401, Idaho Code, nor through any other attorney at law, whether an employee of the agency or entity or otherwise. No action may be prosecuted in the small claims department against the state of Idaho or any justice or judge thereof based upon any act or omission alleged to have been committed by the justice or judge while acting in an official capacity.

(2) Notwithstanding the provisions of section 1-2301, Idaho Code, a small claims action filed against the state of Idaho, or any agency thereof, or any official or employee of the state of Idaho while acting in an official capacity shall be filed in the county of the plaintiff's residence, or if the plaintiff is not a resident of the state of Idaho, in the county where the cause of action arose. In either case, the plaintiff, in addition to service on the defendant, shall serve the Idaho attorney general by certified or registered mail. Prior to appearing in the defense of any small claims action, the defendant public official, or chief executive officer of the defendant agency, with the advice of the attorney general, shall designate in writing the nonattorney employee or agent of the state who is authorized to appear in defense of the action. The written designation shall be filed with the court.

History.
I.C., § 1-2306, as added by 2000, ch. 250, § 9, p. 702.

STATUTORY NOTES

Prior Laws.
Former § 1-2306, which comprised 1969, ch. 103, § 6, p. 348; am. 1982, ch. 363, § 1, p. 913, was repealed by S.L. 2000, ch. 250, § 8, effective January 1, 2001.

1-2307. Attorneys at law — Collection agencies — Witnesses and evidence — Judgment. — [(1)] It shall not be necessary to summon witnesses, but the plaintiff and defendant in any claim shall have the privilege of offering evidence in their behalf, themselves and witnesses appearing at such hearing, and being duly sworn as in other cases, and the magistrate shall render and enter judgment as in other cases. No attorney at law shall appear before the court on behalf of any party at any trial, pretrial matter or posttrial motion in the small claims department; provided however, that nothing herein shall be construed to prevent an attorney at law from providing a party with legal advice concerning the issues in a case or the preparation or presentation of the case, including the preparation of exhibits, affidavits, or memoranda to be presented by the party to the action. An attorney may appear in any proceeding after entry of a small claims judgment relating to the execution of the judgment, including any proceeding for the examination of the judgment debtor in aid of execution of the judgment. Any attorney at law or law firm may be a party to a small claims proceeding and may prosecute any claim the attorney or law firm may have, except any claim obtained by assignment, and may appear before the court as any other plaintiff or defendant in the case.

(2) In any case in which a business organization is a party including, without limitation, a corporation, whether nonprofit or for profit, partnership, professional association or sole proprietorship, no person shall represent the organization except an owner of a substantial interest in the organization or any nonattorney employee of the organization. At the option of the business organization, the same owner or nonattorney employee may represent the business organization in any trial de novo on appeal to the magistrate division and the organization shall not be required to appear through an attorney at law.

(3) Any assignee of a debt or claim triable in the small claims department, including any licensed collection agency, may bring an action in small claims court; provided however, that no attorney at law who is an assignee of the debt or claim may appear before the small claims court.

History.
1969, ch. 103, § 7, p. 348; am. 1996, ch. 373, § 2, p. 1269, am. and redesig. 2000, ch. 250, § 10, p. 702.

STATUTORY NOTES

Prior Laws.
Former § 1-2307, which comprised 1969, ch. 103, § 7, p. 348; am. 1996, ch. 373, § 2, p. 1269, was repealed by S.L. 2000, ch. 250, § 8,

effective January 1, 2001.

Compiler's Notes.

This section, which was formerly compiled as § 1-2308, was amended and redesignated as this section, effective January 1, 2001.

The bracketed designation was added to the first paragraph by the compiler, as it was mistakenly not included in the 2000 amendment.

Effective Dates.

Section 13 of S.L. 2000, ch. 250 provided that the act shall apply to all actions filed on and after January 1, 2001.

JUDICIAL DECISIONS

DECISIONS UNDER PRIOR LAW

Denial of Right to Counsel.

Procedural due process is not denied either a plaintiff or a defendant in a small claims court where each cannot be represented by counsel, because a plaintiff, by knowingly commencing his action therein cannot thereafter object to a denial of counsel, and a defendant may avail himself of the right under § 1-1511 (repealed) to appeal to the district court and a trial de novo with assistance of counsel. Foster v. Walus, 81 Idaho 452, 347 P.2d 120 (1959).

1-2308. [Amended and Redesignated.]

STATUTORY NOTES

Compiler's Notes.

This section is amended and redesignated as § 1-2307, effective January 1, 2001, pursuant to S.L. 2000, ch. 250, § 10.

1-2309. Other formal pleadings not necessary — Speedy trial — Restriction on executory writs. — No formal pleading other than the said claim and notice shall be necessary to define the issue between the parties, and the hearing and disposition of all such actions shall be informal with the sole object of dispensing speedy and quick justice between the litigants, provided, however, that no attachment, garnishment or execution shall issue from the small claims department on any claim except as hereinafter provided.

History.

1969, ch. 103, § 9, p. 348.

1-2310. Judgment against defendant. — If the judgment or order shall be against the defendant, it shall be his duty to pay the same forthwith or execution may ensue as in other cases. On and after sixty (60) days from the date judgment is rendered, the plaintiff shall be entitled to receive, in addition to the amount awarded in the judgment, attorney's fees and all documented costs associated with collection of the judgment. Such attorney's fees and costs shall be set by the court following the filing of a memorandum of attorney's fees and costs with notice to all parties and hearing.

History.

1969, ch. 103, § 10, p. 348; am. 2006, ch. 263, § 4, p. 815.

STATUTORY NOTES

Amendments.
The 2006 amendment, by ch. 263, added the last two sentences.

1-2311. Appeal to lawyer magistrate. — If either party is dissatisfied he may, within thirty (30) days from the entry of said judgment against him, appeal to a lawyer magistrate other than the magistrate who entered said judgment; and if the final judgment is rendered against him by such lawyer magistrate, then he shall pay, in addition to any judgment rendered in the magistrate's division, an attorney's fee to the prevailing party in the sum of twenty-five dollars ($25.00), provided, however, that appeals from such small claims department shall only be allowed in such cases as appeals would be allowed if the action were instituted in the magistrate's division as is now provided, and further provided that the appeal shall be heard in the county wherein the original small claim was filed.

History.
1969, ch. 103, § 11, p. 348; am. 1985, ch. 167, § 1, p. 443.

JUDICIAL DECISIONS

Analysis

Attorney's Fee.
Section 12-121's general award of attorney fees is inconsistent with the more specific provision of this section in regard to awarding attorney fees to prevailing parties in an appeal from the small claims department, and § 12-121 is, therefore, not applicable to the award of attorney fees on such appeals. Huff v. Uhl, 103 Idaho 274, 647 P.2d 730 (1982).

Idaho Civil Procedure Rule 81(q) merely restates the statutory provision for the award of attorney fees in small claims court found in this section. Huff v. Uhl, 103 Idaho 274, 647 P.2d 730 (1982).

Constitutionality.
Since this section and § 1-2312 and Idaho Civil Procedure Rule 81*(l)* require that a person be deprived of his property before he has had a full due process hearing, the bond requirements of said sections are unconstitutional. However, the filing fee ($20.00) is not in the nature of a bond, and, therefore, is not unconstitutional Frizzell v. Swafford, 104 Idaho 823, 663 P.2d 1125 (1983) (decision prior to 1985 amendment of this section and § 1-2312).

Jurisdictional Amount.
The limitations on jurisdictional amount in magistrate courts do not apply in district court, a district court hearing a small claims appeal de novo is not a small claims court, and a district court damage award may exceed the limitation of what a small claims court could award. Gilbert v. Moore, 108 Idaho 165, 697 P.2d 1179 (1985).

Taking Without Due Process.
To allow execution on a small claims judgment before either an appeal has been made final or the time for filing such appeal has expired is a taking without due process. Frizzell v. Swafford, 104 Idaho 823, 663 P.2d 1125 (1983).

Time for Filing.
The time for appeal from a small claims decision begins to run upon the filing of the judgment in the clerk's office and not upon the signing of the judgment by the judge; accordingly, where notice of appeal was filed more than 30 days after judgment was signed but within 30 days after judgment was filed by clerk, appeal was timely. Smethers v. Wilson, 106 Idaho 159, 676 P.2d 734 (Ct. App. 1984).

Cited in: Williams v. Christiansen, 109 Idaho 393, 707 P.2d 504 (Ct. App. 1985).

1-2312. Form for appeal — Filing and disposition. — An appeal from the small claims department may be in the following terms:

In the Magistrate's Division of the District Court for .... County, Idaho, ... Plaintiff, vs. ...., Defendant. Comes now ...., resident of .... County, Idaho and appeals from the decision of the small claims department of the magistrate's division for .... County, Idaho, wherein a judgment for .... dollars was awarded against him on the .... day of ...., ...

.....
(Signed)

Such appeal shall be filed with the magistrate's division. Such appeal shall be tried in the magistrate's division without any other pleadings than those required in the small claims department originally trying the cause, all papers in the case shall be certified to said lawyer magistrate as is now provided by law in other cases of appeals in civil actions in the magistrate's division, provided, however, that said lawyer magistrate may require such other or further statements and information as he may deem necessary for the proper consideration of said controversy.

History.
1969, ch. 103, § 12, p. 348; am. 1985, ch. 167, § 2, p. 443; am. 2002, ch. 32, § 1, p. 46.

JUDICIAL DECISIONS

ANALYSIS

Constitutionality.
Taking without due process.

Constitutionality.
Since § 1-2311, this section and Idaho Civil Procedure Rule 81(*l*) require that a person be deprived of his property before he has had a full due process hearing, the bond requirements of said sections are unconstitutional. However, the filing fee ($20.00) is not in the nature of a bond, but is a nonrecoverable fee and, therefore, is not unconstitutional. Frizzell v. Swafford, 104 Idaho 823, 663 P.2d 1125 (1983) (decision prior to 1985 amendment of this section and § 1-2311).

Taking Without Due Process.
To allow execution on a small claims judgment before either an appeal has been made final or the time for filing such appeal has expired is a taking without due process. Frizzell v. Swafford, 104 Idaho 823, 663 P.2d 1125 (1983).

1-2313. Judgment — Entry on docket — Enforcement. — If no appeal is taken by the defendant and the defendant fails to pay the judgment according to the terms and conditions thereof, the magistrate before whom such hearing was had, may, on application of the plaintiff, certify such judgment in substantially the following form:

In the Magistrate's Division of the District Court for ..... County, Idaho

Plaintiff .....
v.
Defendant .....

In the Small Claims Department

This is to certify that in a certain action before me, the undersigned, had on this the ..... day of ....., 20 ..., wherein ..... was plaintiff and ..... was defendant, jurisdiction of said defendant having had by personal service (or otherwise), as provided by law, I then and there entered judgment against said defendant in the sum of ..... dollars, which judgment has not been paid.

Witness my hand this ..... day of ....., 20 .....

..... Magistrate sitting in the small claims department.

The magistrate of said magistrate's division shall forthwith enter such judgment transcript on the judgment docket of such magistrate's division, and thereafter execution and other process on execution provided by law may issue thereon, as obtains in other cases of judgments of magistrate's division, and a transcript of such judgments may be filed and entered in judgment lien dockets in district courts with like effect as in other cases.

History.
1969, ch. 103, § 13, p. 348, I.C., § 1-2313, as added by 2000, ch. 250, § 11, p. 702.

STATUTORY NOTES

Compiler's Notes.
The words enclosed in parentheses so appeared in the 1969 Session Laws.

1-2314. Separate docket for small claims department. — Each magistrate shall keep a separate docket for the small claims department of his division in which he shall make a permanent record of all proceedings, orders and judgments had and made in such small claims department.

History.
1969, ch. 103, § 14, p. 348.

1-2315. Jury trial not allowed. — No party may have his cause heard before a jury in the small claims department of the magistrate's division of the district court.

History.
1969, ch. 103, § 15, p. 348.

STATUTORY NOTES

Effective Dates.
Section 16 of S.L. 1969, ch. 103 provided that the act should be effective at 12:01 A.M. on January 11, 1971.

CHAPTER 24

COURT OF APPEALS

1-2401. Short title. — This act shall be know [known] and may be cited as the "Idaho Court of Appeals Act."

History.
I.C., § 1-2401, as added by 1980, ch. 245, § 1, p. 565.

STATUTORY NOTES

Compiler's Notes.
The bracketed word "known" was inserted by the compiler.
The words "this act" refer to S.L. 1980, ch. 245, which is compiled as §§ 1-2401 to 1-2411.

Effective Dates.
Section 2 of S. L. 1980, ch. 245 read: "This act shall be in full force and effect on and after July 1, 1981. After this date, the supreme court may transfer nonargued appeals pending before it to the court of appeals for hearing and decision, consistent with this act."

1-2402. Statement of intent. — It is hereby declared that the purpose of this act is to create an appellate court subordinate to the Idaho supreme court, to be known as the Idaho court of appeals.

History.
I.C., § 1-2402, as added by 1980, ch. 245, § 1, p. 565.

STATUTORY NOTES

Cross References.
Idaho supreme court, § 1-201 et seq.

Compiler's Notes.
The words "this act" refer to S.L. 1980, ch. 245, which is compiled as §§ 1-2401 to 1-2411.

1-2403. Court of appeals established — Administration and supervision. — There is hereby created the Idaho court of appeals. The court of appeals shall be part of the judicial branch of government and shall be subject to administration and supervision by the supreme court of Idaho pursuant to article 5, section 2 of the Idaho constitution.

History.
I.C., § 1-2403, as added by 1980, ch. 245, § 1, p. 565.

1-2404. Number of judges — Qualifications — Conduct and discipline — Term — Selection — Election — Compensation. — (1) The court of appeals shall consist of four (4) judges, and shall sit in panels of not less than three (3) judges each.

(2) No person shall be appointed or elected to the office of judge of the court of appeals unless he has attained the age of thirty (30) years at the time of his appointment or election, is a citizen of the United States, shall have been admitted to the practice of law for at least ten (10) years prior to taking office, and is admitted to practice law in the state of Idaho, and has resided within this state two (2) years next preceding his appointment or election.

(3) A judge of the court of appeals shall be governed by the code of judicial conduct as promulgated by the Idaho supreme court, and shall be subject to removal, discipline, or retirement pursuant to section 1-2103, Idaho Code.

(4)(a) Judges of the court of appeals shall be appointed by the governor effective the first Monday of January, 1982, for the following initial terms: one (1) judge shall be appointed for a term to expire on the first Monday of January, 1985, one (1) judge shall be appointed for a term expiring two (2) years later, and one (1) judge shall be appointed for a term expiring two (2) further years later. Thereafter, the term of office of a judge of the court of appeals shall be six (6) years.

(b) Vacancies in the office of judge of the court of appeals shall be filled in the same manner as vacancies in the office of supreme court justice or district judge.

(c) The positions of judges of the Idaho court of appeals shall first be filled as vacancies. The judicial council shall submit to the governor its recommendations for the offices at the earliest practicable time after the effective date of this act. The governor may make the appointment at any time thereafter, to be effective the first Monday of January, 1982, for the terms set forth in section 1-2404(4)(a), Idaho Code.

(d) In making its nominations for the initial vacancies to be created by this act, the Idaho judicial council shall submit the names of not less than six (6) nor more than nine (9) qualified persons for the initial three (3) vacancies to be created by this act. Otherwise, the judicial council shall submit the names of not less than two (2) nor more than four (4) persons for each vacancy. The governor shall appoint the judges, identifying each appointment by the length of the term of appointment.

(e) Nominations and appointments to fill initial or subsequent vacancies shall be made with due regard for balanced geographical membership of the court of appeals.

(f) Subsequent terms of office of a judge who has been appointed to the court of appeals shall be subject to a statewide nonpartisan election to be held in the primary election next preceding the expiration of an appointed term in the same method and manner as a justice of the supreme court.

(g) A fourth judge of the court of appeals shall be appointed by the governor effective the first Monday of January, 2009, for an initial term to

expire on the first Monday of January, 2013. Thereafter, the term of office for this position shall be six (6) years. The judicial council shall submit the names of not less than two (2) nor more than four (4) persons for the initial vacancy in this position under the procedure set forth in section 1-2102, Idaho Code. This position shall be subject to all of the provisions relating to qualifications, removal, discipline, retirement, filling of vacancies, election and compensation set forth in this chapter.

(5) Judges of the court of appeals shall receive an annual salary in an amount of one thousand dollars ($1,000) less than the annual salary of a supreme court justice and except for judges who have made an election to remain in the public employee retirement system of Idaho pursuant to section 1-2011, Idaho Code, shall receive compensation upon retirement as provided in chapter 20, title 1, Idaho Code.

History.

I.C., § 1-2404, as added by 1980, ch. 245, § 1, p. 565; am. 1981, ch. 271, § 1, p. 572; am. 1985, ch. 29, § 5, p. 52; am. 1998, ch. 126, § 4, p. 466; am. 2008, ch. 24, § 1, p. 36.

STATUTORY NOTES

Cross References.

Public employee retirement system, § 59-1301 et seq.

Amendments.

The 2008 amendment, by ch. 24, in subsection (1), substituted "four (4) judges" for "three (3) judges"; at the end of paragraph (4)(a), deleted "except that no judge of the court of appeals shall serve beyond the limits set forth in section 1-2007, Idaho Code"; and added paragraph (4)(g).

Compiler's Notes.

The phrase "effective date of this act," in paragraph (4)(c), refers to the effective date of S.L. 1981, ch. 271, which was July 1, 1981.

Effective Dates.

Section 9 of S.L. 1985, ch. 29 read: "This act shall be in full force and effect on and after July 1, 1985; provided that notwithstanding the provisions of sections 3, 4, 5 and 6 of this act, it is the intent of the legislature that the provisions of this act requiring that persons be admitted to the practice of law within this state for at least ten years prior to taking office, shall not apply to justices or judges holding office on the effective date of this act, nor prohibit them from seeking election, re-election or appointment to the office of supreme court justice, court of appeals judge, or district judge, as provided by law."

1-2405. Interim and supplemental membership of court of appeals. — (1) Commencing July 1, 1981, until funds have been appropriated for, and the governor has filled by appointment, three (3) positions on the Idaho court of appeals, and continuing thereafter as needed, the supreme court may provide for the assignment of active or senior district judges, active or senior attorney magistrate judges, senior justices of the supreme court and senior judges of the court of appeals to serve on a panel of the court of appeals. Assignments may be made for a time certain, for a term of court, or specifically for one (1) or more cases on the docket of the court of appeals.

(2) An active or senior district judge or active or senior attorney magistrate judge may not be assigned to hear cases in which he or she participated while serving on the district court, nor may an active district judge or an active attorney magistrate judge hear cases which originated in his or her judicial district.

(3) Active district judges or active attorney magistrate judges serving on the court of appeals shall be entitled to no additional compensation, but shall be reimbursed for expenses, as provided by section 1-711, Idaho Code, for active district judges, or as provided by section 1-2219, Idaho Code, for active attorney magistrate judges. Compensation for senior justices or senior judges serving on the court of appeals shall be paid in the manner provided for in section 1-2005 or section 1-2221, Idaho Code.

History.
I.C., § 1-2405, as added by 1980, ch. 245, § 1, p. 565; am. 1999, ch. 148, § 1, p. 419; am. 2002, ch. 95, § 2, p. 263.

1-2406. Jurisdiction — Assignment and revocation of assignment of cases — Authority in furtherance of jurisdiction. — (1) Any provision of law to the contrary notwithstanding, the Idaho court of appeals shall have jurisdiction to hear and to decide all cases assigned to it by the Idaho supreme court; provided, that the supreme court shall not assign cases invoking the supreme court's original jurisdiction, nor appeals from imposition of sentences of capital punishment in criminal cases, nor appeals from the industrial commission, nor appeals from the public utilities commission.

(2) In assigning cases to the Idaho court of appeals, the Idaho supreme court shall give due regard to the workload of each court, to the error review and correction functions of the court of appeals, and to the desirability of retaining for decision by the supreme court those cases in which there is substantial public interest or in which there are significant issues involving clarification or development of the law.

(3) Upon motion of any party, or upon recommendation of the court of appeals, or upon its own motion, the supreme court may revoke assignment of a case to the court of appeals. In the event of such transfer or revocation of assignment, the case shall be heard and decided by the supreme court.

(4) A judge of the court of appeals may be assigned cases in other courts from time to time by the chief justice of the supreme court of Idaho, and when so assigned shall have the same powers, duties and functions as a judge of the court to which he is assigned; provided, however, that no judge shall participate in the review by the supreme court or by the court of appeals of a case in which he participated while serving on the district court or court of appeals.

History.
I.C., § 1-2406, as added by 1980, ch. 245, § 1, p. 565; am. 1981, ch. 271, § 2, p. 572.

STATUTORY NOTES

Cross References.
Industrial commission, § 72-501 et seq.
Public utilities commission, § 61-201 et seq.

RESEARCH REFERENCES

A.L.R. — Civil actions removable from state court to federal court under 28 U.S.C.A. § 1443. 159 A.L.R. Fed. 377.

1-2407. Administration — Employees and clerical assistance for court — Official seal and court of record — Place of sessions. — (1) The court of appeals shall be subject to the administrative policies and procedures which may be established by the supreme court.

(2) Appointment of employees by the court of appeals shall be governed by personnel policies approved by rule of the supreme court.

(3) The clerk of the supreme court shall be the clerk of the court of appeals.

(4) The court of appeals shall have an official seal and shall be a court of record.

(5) The principal office of the court of appeals and chambers of its judges, except those serving pursuant to section 1-2405, Idaho Code, shall be at Boise, Idaho.

(6) The court of appeals shall sit in Boise, but also may sit in such other places as it considers convenient for the conduct of its business.

(7) All proceedings of the court of appeals shall be governed by rules of the supreme court and by rules of the court of appeals approved by the supreme court.

History.
I.C., § 1-2407, as added by 1980, ch. 245, § 1, p. 565.

1-2408. Chief judge. — The chief justice of the supreme court shall appoint a chief judge of the court of appeals for a term of two (2) years or such shorter period as may be determined by the chief justice. The chief judge shall exercise such administrative powers as may be delegated by the full membership of the court of appeals, not in conflict with supreme court rules.

History.
I.C., § 1-2408, as added by 1980, ch. 245, § 1, p. 565; am. 1981, ch. 271, § 3, p. 572.

1-2409. Review of decisions of court of appeals. — Any party in interest who is aggrieved by a decision of the court of appeals may petition the supreme court, within twenty-one (21) days following said decision, for review of the decision. The supreme court may, in its discretion, grant such petition. Review of decisions of the court of appeals shall be governed by the rules of the supreme court.

History.
I.C., § 1-2409, as added by 1980, ch. 245, § 1, p. 565; am. 1981, ch. 271, § 4, p. 572.

STATUTORY NOTES

Effective Dates.
Section 5 of S.L. 1981, ch. 271 provided that the act should become effective July 1, 1981.

1-2410. Right of appeal not created. — Nothing in this act is intended to provide or to create a right of appeal where such right is not otherwise provided or created by law.

History.
I.C., § 1-2410, as added by 1980, ch. 245, § 1, p. 565.

STATUTORY NOTES

Compiler's Notes.
The words "this act" refer to S.L. 1980, ch. 245, which is compiled as §§ 1-2401 to 1-2411.

1-2411. Filing of appeal and filing fee — Unitary appeal. — (1) In any appeal to the supreme court or to the court of appeals, there shall be only one (1) filing and one (1) filing fee required. The filing fee shall be as prescribed by sections 1-402 and 1-2003, Idaho Code.

(2) It is intended by this chapter that the supreme court shall establish the most convenient and expeditious procedures for filing of appeals, and that all appeals to the court of appeals or the supreme court shall be treated as one (1) appeal process under the jurisdiction of the supreme court.

(3) All appeals shall be processed in the supreme court unless or until assigned to the court of appeals.

History.
I.C., § 1-2411, as added by 1980, ch. 245, § 1, p. 565.

STATUTORY NOTES

Effective Dates.
Section 2 of S. L. 1980, ch. 245 read: "This act shall be in full force and effect on and after July 1, 1981. After this date, the supreme court may transfer nonargued appeals pending before it to the court of appeals for hearing and decision, consistent with this act."

TITLE 2

JURIES AND JURORS

CHAPTER 1

JURIES — KINDS AND DEFINITIONS

2-101. Jury defined. — A jury is a body of men or women, or both, temporarily selected from the citizens of a particular county and invested with power to present or indict a person for a public offense or to try a question of fact.

History.
C.C.P. 1881, § 73; R.S., R.C., & C.L., § 3935; C.S., § 6512; I.C.A., § 2-101; am. 1943, ch. 158, § 1, p. 320; am. 2000, ch. 70, § 1, p. 153.

STATUTORY NOTES

Cross References.
Civil cases, formation of jury, Idaho Civil Procedure Rules 47(a) to 48(b).
Criminal cases, formation of jury, §§ 19-1905 to 19-1908.
Number of jurors, Idaho Const. art. 1, § 7; §§ 2-103, 2-105.
Right to trial by jury, Idaho Const. art. 1, § 7.
Three-fourths verdict, Idaho Const. art. 1, § 7; § 2-104.
Waiver of trial by jury, Idaho Const. art. 1, § 7.
Will contests, jury in, § 15-1-306.

2-102. Kinds of juries. — Juries are of three (3) kinds:
1. Grand juries.
2. Trial juries.
3. Juries of inquest.

History.
C.C.P. 1881, § 74; R.S., R.C., & C.L., § 3936; C.S., § 6513; I.C.A., § 2-102.

2-103. Grand jury defined. — A grand jury is a body of men or women or both, sixteen (16) in number, returned in pursuance of law from citizens of the county before a court of competent jurisdiction and sworn to inquire of public offenses committed or triable within the county.

History.
C.C.P. 1881, § 74; R.S., R.C., & C.L., § 3936; C.S., § 6513; I.C.A., § 2-102; am. 1953, ch. 87, § 1, p. 118.

STATUTORY NOTES

Cross References.
Formation of grand jury, § 19-1001 et seq.
Order for grand jury, Idaho Criminal Rule 6.1.
Powers and duties of grand jury, § 19-1101 et seq.
Presentment and proceedings thereon, § 19-1201 et seq.

JUDICIAL DECISIONS

Grand Jury.
Grand jury is required to consist of 16 members, but 12 jurors constitute a quorum. Rich v. Varian, 36 Idaho 355, 210 P. 1011 (1922).

RESEARCH REFERENCES

Am. Jur. — 38 Am. Jur. 2d, Grand Jury, § 1.
C.J.S. — 38A C.J.S., Grand Juries, § 1 et seq.
A.L.R. — Purposeful inclusion of Negroes in grand or petit jury as unconstitutional discrimination. 4 A.L.R. Fed. 449.

2-104. Trial jury defined — Verdict in civil actions. — A trial jury is a body of men or women, or both, returned from the citizens of a particular county before a court or officer of competent jurisdiction and sworn to try and determine by a verdict a question of fact. Three-fourths (3/4) of the jury may render a verdict in a civil action, and such verdict shall have the same effect as a unanimous verdict.

History.
C.C.P. 1881, § 76; R.S., § 3938; am. 1890-1891, p. 165, § 1; reen. 1899, p. 110, § 1; reen. R.C. & C.L., § 3938; C.S., § 6515; I.C.A., § 2-104; am. 1943, ch. 158, § 2, p. 320; am. 2000, ch. 70, § 2, p. 153.

STATUTORY NOTES

Cross References.
Civil cases, formation of jury, Idaho Civil Procedure Rules 47(a) to 48(b).
Criminal cases, formation of jury, §§ 19-1905 to 19-1908.
Right to jury trial, Idaho Const., art. 1, § 7.

JUDICIAL DECISIONS

Citizenship.
Citizenship always has been a qualification for jury service, but every person possessing qualifications of elector has not been always included among those eligible for jury duty. State v. Kelley, 39 Idaho 668, 229 P. 659 (1924).

RESEARCH REFERENCES

Am. Jur. — 47 Am. Jur. 2d, Jury, § 1 et seq.
C.J.S. — 50A C.J.S., Juries, § 1 et seq.

2-105. Constitution of trial jury. — A trial jury consists of twelve (12) men or women or both: provided, that in civil actions the jury may consist of any number less than twelve (12) upon which the parties may agree in open

court: and provided, further, that in cases of misdemeanor and in civil actions involving not more than five hundred dollars ($500), exclusive of costs, the jury shall consist of not more than six (6).

History.
R.S., § 3939; compiled R.C., § 3939; reen. C.L., § 3939; C.S., § 6516; I.C.A., § 2-105; am. 1965, ch. 80, § 2, p. 130; am. 1978, ch. 80, § 1, p. 155.

STATUTORY NOTES

Cross References.
Alternate jurors, § 19-1904.

2-106. Jury of inquest defined. — A jury of inquest is a body of men or women, or both, summoned from the citizens of a particular county, before the sheriff, coroner, or other ministerial officer to inquire of particular facts.

History.
C.C.P. 1881, § 78; R.S., R.C., & C.L., § 3940; C.S., § 6517; I.C.A., § 2-106; am. 2000, ch. 70, § 3, p. 153.

STATUTORY NOTES

Cross References.
Coroners' inquest, § 19-4301 et seq.

CHAPTER 2

JURY SELECTION AND SERVICE

SECTION.

2-201. Title of act. — This act may be cited as the "Uniform Jury Selection and Service Act."

History.
1971, ch. 169, § 21, p. 799.

STATUTORY NOTES

Cross References.
Court rules regarding juries, Idaho Civil Procedure Rules 47(a) to 49(b); Idaho Criminal Rules 23, 24, 31.

Prior Laws.
Former § 2-201, which comprised C.C.P. 1881, § 79; R.S., R.C., & C.L., § 3941; C.S., § 6518; I.C.A., § 2-201; am. 1943, ch. 158, § 3, p. 320, was repealed by S.L. 1971, ch. 169, § 23.

Compiler's Notes.
The words "this act" refer to S.L. 1971, ch. 169, which is compiled as §§ 2-201 to 2-221.

JUDICIAL DECISIONS

Minority Representation.
A jury panel selected in accordance with this chapter met constitutional standards, even though the jury did not include persons similar to defendant who had a Spanish-American background, where there was no evidence that such persons were systematically excluded. State v. Gerhardt, 97 Idaho 603, 549 P.2d 262 (1976).

Cited in: State v. Padilla, 101 Idaho 713, 620 P.2d 286 (1980); Floyd v. State, 135 Idaho 379, 17 P.3d 880 (Ct. App. 2000).

2-202. Policy of state. — It is the policy of this state that all persons selected for jury service be selected at random from a fair cross section of the population of the area served by the court, and that all qualified citizens have the opportunity, in accordance with this act to be considered for jury service in this state and an obligation to serve as jurors when summoned for that purpose.

History.
1971, ch. 169, § 1, p. 799.

STATUTORY NOTES

Prior Laws.
Former § 2-202, which comprised C.C.P. 1881, § 80; R.S., R.C., & C.L., § 3942; C.S., § 6519; I.C.A., § 2-202, was repealed by S.L. 1971, ch. 169, § 23.

Compiler's Notes.
For words "this act", see Compiler's Notes, § 2-201.

JUDICIAL DECISIONS

Age of Jurors and Defendant.
In prosecution for possession of marijuana where defendant was 32 and average age of juror was 47, the fact that jury panel was older than cross section of county is not material where the act is followed and there is nothing in record to indicate a systematic exclusion of an identifiable class of people. State v. Pontier, 95 Idaho 707, 518 P.2d 969 (1974).

Cited in: State v. Silcox, 103 Idaho 483, 650 P.2d 625 (1982).

2-203. Discrimination prohibited. — A citizen shall not be excluded from jury service in this state on account of race, color, religion, sex, national

origin, or economic status.

History.
1971, ch. 169, § 2, p. 799.

STATUTORY NOTES

Prior Laws.
Former § 2-203 which comprised C.C.P. 1881, § 81; R.S., R.C., & C.L., § 3943; C.S., § 6520; I.C.A., § 2-203; am. 1943, ch. 158, § 4, p. 320; am. 1969, ch. 124, § 1, p. 384, was repealed by S.L. 1971, ch. 169, § 23.

JUDICIAL DECISIONS

Decisions Under Prior Law

Racial Discrimination.
Defendant, a quarter-breed Indian, could not complain that no Negroes, Greeks or Italians were placed on the jury list since he was not a member of any of those races. State v. Walters, 61 Idaho 341, 102 P.2d 284 (1940).

RESEARCH REFERENCES

Am. Jur. — 47 Am. Jur. 2d, Jury, § 101 et seq.

C.J.S. — 50A C.J.S., Juries, § 262 et seq.

A.L.R. — Racial, religious, economic, social or political prejudice of proposed juror as proper subject of inquiry or ground of challenge on voir dire in criminal cases. 63 A.L.R.3d 1052; 94 A.L.R.3d 15; 95 A.L.R.3d 172.

Racial, religious, economic, social or political prejudice of proposed juror as proper subject of inquiry or ground of challenge on voir dire in civil case. 95 A.L.R.3d 172.

Beliefs regarding capital punishment as disqualifying juror in capital case for cause. 39 A.L.R.3d 550.

Jury: membership in racially biased or prejudiced organization as proper subject of voir dire inquiry or ground for challenge. 63 A.L.R.3d 1052.

Racial or ethnic prejudice of prospective jurors as proper subject of inquiry or ground of challenge on voir dire in state criminal case. 94 A.L.R.3d 15.

Religious belief, affiliation, or prejudice of prospective juror as proper subject of inquiry or ground for challenge on voir dire. 95 A.L.R.3d 172.

Deafness of juror as grounds for impeaching verdict, or securing new trial or reversal on appeal. 38 A.L.R.4th 1170.

Purposeful inclusion of Negroes in grand or petit jury as unconstitutional discrimination. 4 A.L.R. Fed. 449.

Voir dire examination of prospective jurors under rule 24(a) of federal rules of criminal procedure. 28 A.L.R. Fed. 26.

2-204. Definitions. — As used in this chapter:

(1) "Court" means district courts of this state, including the magistrates division, and includes, when the context requires, any judge of the court;

(2) "Clerk" and "clerk of the court" mean the duly elected and acting clerk of the district court and ex officio auditor and recorder and duly appointed deputies;

(3) "Master jury list" means the voter registration lists for the county which shall be supplemented with names from other sources prescribed pursuant to section 2-206, Idaho Code, in order to foster the policy and protect the rights secured by sections 2-202 and 2-203, Idaho Code;

(4) "Voter registration lists" means the most current official records, maintained by the county clerk, of persons registered to vote in any national, state, county, or municipal election;

(5) "Jury selection system" means any physical device or automated system for the management of the names or identifying numbers of prospective jurors;

(6) "Prospective jury panel" means the list of names or identifying numbers of prospective jurors drawn at random from the master jury list pursuant to section 2-208, Idaho Code, and who are not disqualified pursuant to section 2-209, Idaho Code.

History.
1971, ch. 169, § 3, p. 799; am. 1978, ch. 82, § 1, p. 156; am. 2001, ch. 28, § 1, p. 34; am. 2005, ch. 190, § 1, p. 583.

STATUTORY NOTES

Prior Laws.
Former § 2-204, which comprised R.S., R.C., & C.L., § 3944, C.S., § 6521; I.C.A., § 2-204, was repealed by S.L. 1971, ch. 169, § 23.

2-205. Jury commissions established — Composition — Qualifications of commissioners — Expenses and compensation. — A jury commission is established in each county to manage the jury selection process under the supervision and control of the court. The jury commission shall be composed of the clerk of the district court and a jury commissioner appointed by the administrative judge. The jury commissioner shall serve until a successor is appointed and qualifies. The jury commissioner must be a citizen of the United States and a resident in the county in which the jury commissioner serves. The jury commissioner may be reimbursed for travel, subsistence, and other necessary expenses incurred in the performance of jury commission duties and may receive compensation at a per diem rate fixed by the administrative judge and payable from county funds, if not otherwise a county employee.

History.
1971, ch. 169, § 4, p. 799; am. 1974, ch. 26, § 6, p. 804; am. 1998, ch. 71, § 1, p. 265; am. 2002, ch. 94, § 1, p. 256; am. 2005, ch. 190, § 2, p. 583.

STATUTORY NOTES

Prior Laws.
Former § 2-205, which comprised C.C.P. 1881, § 82; R.S., R.C., & C.L., § 3945; C.S., § 6522; I.C.A., § 2-205, regarding grounds for excuse, was repealed by S.L. 1971, ch. 169, § 23.

JUDICIAL DECISIONS

Officer as Jury Consultant.
The investigating officer was acting in the capacity of a jury consultant, not as a jury commissioner, and as a consultant, the officer could do no more than assist the prosecution in the exercise of their general and preemptory challenges. Floyd v. State, 135 Idaho 379, 17 P.3d 880 (Ct. App. 2000).

RESEARCH REFERENCES

Am. Jur. — 47 Am. Jur. 2d, Jury, § 101 et seq.

C.J.S. — 50A C.J.S., Juries, § 306 et seq.

2-206. Master jury list of registered voters — Supplementation by other lists designated by supreme court — List available to commission — Open to public inspection. — (1) The jury commission for each county shall compile and maintain a master jury list consisting of the current voter registration list for the county supplemented with names from other lists of persons resident therein, such as lists of utility customers, property taxpayers, motor vehicle registrations, drivers' licenses, and state identification cards, which the supreme court from time to time designates. The supreme court shall initially designate the other lists within ninety (90) days following the effective date of this act and exercise the authority to designate from time to time in order to foster the policy and protect the rights secured by sections 2-202 and 2-203, Idaho Code.

(2) In compiling the master jury list the jury commission shall avoid duplication of names.

(3) Whoever has custody, possession, or control of any of the lists used in compiling the master jury list, including those designated under subsection (1) of this section by the supreme court as supplementary sources of names, shall electronically transfer the list, including any changes, deletions and additions, and at the request of the jury commission, the custodian shall prepare a hard copy of the list and make the custodian's records, from which the list was compiled, available for inspection, reproduction, and copying at all reasonable times.

(4) The master jury list shall be open to the public for examination as provided by supreme court rule.

History.
1971, ch. 169, § 5, p. 799; am. 2005, ch. 190, § 3, p. 583.

STATUTORY NOTES

Prior Laws.
Former § 2-206, which comprised C.C.P. 1881, § 83; R.S., R.C., & C.L., § 3946; C.S., § 6523; I.C.A., § 2-206, was repealed by S.L. 1971, ch. 169, § 23.

Compiler's Notes.
The phrase "effective date of this act," in subsection (1), refers to the effective date of S.L. 1971, ch. 169, which was March 20, 1971.

JUDICIAL DECISIONS

Analysis

Age of Jurors.
In prosecution for possession of marijuana where defendant was 32 and average age of juror was 47, the fact that jury panel was older than cross section of county is not material where the act is followed and there is nothing in record to indicate a systematic exclusion of an identifiable class of people. State v. Pontier, 95 Idaho 707, 518 P.2d 969 (1974).

Compilation of List.
Where the defendant made no argument, nor did the record indicate, that the lack of participation by one member of the two-member jury commission in the preparation and

compilation of the jury lists affected the random nature or objectivity of the selection process, the compilation of the jury lists by the one member unaided by the other member was valid since the defendant did not establish nor even argue that any prejudice resulted therefrom. State v. Silcox, 103 Idaho 483, 650 P.2d 625 (1982), overruled on other grounds, State v. Flint, 114 Idaho 806, 761 P.2d 1158 (1988).

In an appeal from convictions of burglary challenging the constitutionality of the jury selection process, where the evidence showed that Hispanics, who accounted for 8.2 percent of the county population, were underrepresented in the jury pool by an absolute disparity of five percent and were 61 percent less likely than the average members of the community to be called for jury service, such figures, taken together, were sufficient to show a lack of "fair and reasonable" representation, thereby imposing upon the state an obligation to justify the underrepresentation. However, the state met this burden by showing that the master jury list was derived from county lists of adult, licensed drivers and registered voters, since such source lists are commonly used and serve a significant state interest in maintaining an efficient, practical jury selection system. State v. Lopez, 107 Idaho 726, 692 P.2d 370 (Ct. App. 1984).

Source of List.

The state is entitled to use voter registration and driver's license lists as a means of selecting jurors, and the state may establish minimum qualifications for jurors where the qualifications relate to the juror's competence to understand and administer the law. State v. Paz, 118 Idaho 542, 798 P.2d 1 (1990), cert. denied, 501 U.S. 1259, 111 S. Ct. 2911, 115 L. Ed. 2d 1074 (1991), overruled on other grounds, State v. Card, 121 Idaho 425, 825 P.2d 1081 (1991).

The state is free to designate the source of jury lists, so long as the source reasonably reflects a cross-section of the population suitable in character and intelligence for that civic duty. State v. Paz, 118 Idaho 542, 798 P.2d 1 (1990), cert. denied, 501 U.S. 1259, 111 S. Ct. 2911, 115 L. Ed. 2d 1074 (1991), overruled on other grounds, State v. Card, 121 Idaho 425, 825 P.2d 1081 (1991).

Voter Registration List.

Where trial court drew jury venire exclusively from voter registration lists because lists of motor vehicle registrations and utility customers were not yet finished by office of administrative director of the courts, trial court's action did not violate the requirements of this section and Idaho Civil Procedure Rule 47(a). State v. Padilla, 101 Idaho 713, 620 P.2d 286 (1980).

Cited in: Yount v. Boundary County, 118 Idaho 307, 796 P.2d 516 (1990).

Decisions Under Prior Law

Analysis

Compliance with law.
Duties of commissioners regarding list.
Jurisdiction to quash panel.

Compliance With Law.

It will be presumed, in the absence of proof to the contrary, that law regarding compilation of jury list was complied with in the selection of the jury list. State v. Walters, 61 Idaho 341, 102 P.2d 284 (1940).

Duties of Commissioners Regarding List.

In the preparation of jury lists, the county commissioners should substantially comply with the statute in taking the names from the poll lists of the respective precincts, and the preparation of the lists should be by the board rather than by the individual members of the board. State v. Walters, 61 Idaho 341, 102 P.2d 284 (1940).

A defendant's motion to quash the panel on the ground that the jury lists had not been selected and prepared as required by law was properly denied, notwithstanding the jury lists were made up by each individual commissioner preparing his own list and then having the names on the three lists placed in the jury box as the list, instead of being made by the board of county commissioners as such, where it could be inferred that the board, after preparing the lists, filed certified lists of persons selected to serve as jurors with the clerk of the district court, since such certified list was the official action of the board. State v. Walters, 61 Idaho 341, 102 P.2d 284 (1940).

Jurisdiction to Quash Panel.

Where the board of commissioners made a jury list under the former section regarding compilation of jury list and no appeal was taken from their order, the district court was without jurisdiction to quash the panel and discharge the jury on an ex parte motion of the district attorney not made in a pending case or pursuant to the complaint of any litigant, on the ground of illegality in the selection of the list. Heitman v. Morgan, 10 Idaho 562, 79 P. 225 (1905).

RESEARCH REFERENCES

Am. Jur. — 47 Am. Jur. 2d, Jury, § 112 et seq.

A.L.R. — Validity of requirement or practice of selecting prospective jurors exclusively from list of registered voters. 80 A.L.R.3d 869.

2-207. Master jury list — Manner of updating. — (1) Updated information from the lists of voter registration, drivers' licenses, and state identification cards, including any changes, deletions and additions, shall be made to the master jury list from time to time as determined by the jury commission or as ordered by the administrative judge, but at a minimum not less frequently than December of each odd-numbered year.

(2) In the alternative, or in addition to the procedure set forth in subsection (1) of this section, and if ordered by the administrative judge, in December of each odd-numbered year, or more frequently as determined by the administrative judge, the master jury list shall be emptied and refilled as prescribed in section 2-206, Idaho Code.

History.
1971, ch. 169, § 6, p. 799; am. 1974, ch. 26, § 7, p. 804; am. 2002, ch. 94, § 2, p. 256; am. 2005, ch. 190, § 4, p. 583.

JUDICIAL DECISIONS

Cited in: State v. Pontier, 95 Idaho 707, 518 P.2d 969 (1974); State v. Silcox, 103 Idaho 483, 650 P.2d 625 (1982); Yount v. Boundary County, 118 Idaho 307, 796 P.2d 516 (1990).

RESEARCH REFERENCES

C.J.S. — 50A C.J.S., Juries, § 306 et seq.

2-208. Names randomly drawn from master jury list — Qualification questionnaire forms for prospective jurors — Mailing and return — Order to appear — Criminal contempt — Penalty for misrepresentation. — (1) The court or any other state or county official having authority to conduct a trial or hearing with a jury within the county may direct the jury commission to draw and assign to that court or official the number of qualified jurors deemed necessary for one (1) or more jury panels or as required by law for a grand jury. Upon receipt of the direction and in a manner prescribed by the court, the jury commission shall publicly draw at random, by use of a manual, mechanical, or automated system, from the master jury list the number of prospective jurors specified. Neither the names drawn nor the list shall be disclosed to any person except upon specific order of the presiding judge.

(2) Each person on the prospective jury panel shall be served with a summons, issued by the clerk of the court or the jury commissioner. The summons shall be served either personally, or by regular mail or certified mail, addressed to the prospective juror at that person's usual residence, business or post office address.

(3) The clerk or the jury commissioner shall mail a qualification questionnaire form, accompanied by instructions, addressed to the prospective jurors at their usual residence, business or post office address. The qualifi-

cation questionnaire form may be sent together with the summons in a single mailing to a prospective juror. The qualification questionnaire form shall be in a form prescribed by the supreme court. The qualification questionnaire form must be completed and returned to the clerk or the jury commissioner within ten (10) days from the date of mailing. The qualification questionnaire form shall elicit the name, address of residence, and age of the prospective juror and whether the prospective juror: (a) is a citizen of the United States of America and a resident of the county, (b) is able to read, speak and understand the English language, (c) has any disability impairing his capacity to render satisfactory jury service, and (d) has lost the right to serve on a jury because of a felony criminal conviction as provided by section 3, article VI, of the constitution of the state of Idaho, and who has not been restored to the rights of citizenship pursuant to section 18-310, Idaho Code, or other applicable law. The qualification questionnaire form shall contain the prospective juror's declaration that his responses are true to the best of his knowledge and his acknowledgment that a willful misrepresentation of a material fact may be punished as a misdemeanor. Notarization of the completed qualification questionnaire form shall not be required. If the prospective juror is unable to complete the form, another person may do so on his or her behalf and shall indicate that such person has done so and the reason therefor. If it appears there is an omission, ambiguity, or error in a returned form, the clerk or the jury commissioner shall again send the form with instructions to the prospective juror to make the necessary addition, clarification, or correction and to return the form to the jury commission within ten (10) days after its second mailing.

(4) Any prospective juror who fails to return a completed qualification questionnaire form as instructed shall be directed by the jury commission to appear forthwith before the clerk or the jury commissioner to complete the qualification questionnaire form. At the time of his appearance for jury service, or at the time of interview before the court, clerk, or the jury commissioner, any prospective juror may be required to complete another qualification questionnaire form in the presence of the court, clerk, or the jury commissioner, at which time the prospective juror may be questioned, but only with regard to his responses to questions contained on the form and grounds for his excuse or disqualification. Any information thus acquired by the court, clerk, or the jury commissioner shall be noted on the qualification questionnaire form.

(5) A prospective juror who fails to appear as directed by the commission, pursuant to subsection (3) of this section shall be ordered by the court to appear and show cause for his failure to appear as directed. If the prospective juror fails to appear pursuant to the court's order or fails to show good cause for his failure to appear as directed by the jury commission, he is guilty of contempt and upon conviction may be fined not more than three hundred dollars ($300) or imprisoned not more than three (3) days, or both, and postponed to a new prospective jury panel as set by the presiding judge.

(6) Any person who willfully misrepresents a material fact on a qualification questionnaire form for the purpose of avoiding or securing service as a juror is guilty of a misdemeanor.

(7) The contents of the juror qualification questionnaire form shall be confidential to the extent provided by rules of the Idaho supreme court.

(8) The clerk or the jury commissioner may provide an opportunity to a prospective juror to complete and return the qualification questionnaire form through electronic mail, facsimile transmission, or other reliable means of communication prior to mailing the qualification questionnaire form to the prospective juror. If the prospective juror completes and returns the qualification questionnaire form in such manner, the qualification questionnaire form need not be mailed to the prospective juror.

History.

1971, ch. 169, § 7, p. 799; am. 1974, ch. 26, § 8, p. 804; am. 2002, ch. 94, § 3, p. 256; am. 2003, ch. 116, § 1, p. 359; am. 2005, ch. 190, § 5, p. 583.

JUDICIAL DECISIONS

Analysis

Compilation of list.
Computer use.
Qualification forms.

Compilation of List.

Where the defendant made no argument, nor did the record indicate, that the lack of participation by one member of the two-member jury commission in the preparation and compilation of the jury lists affected the random nature or objectivity of the selection process, the compilation of the jury lists by the one member unaided by the other member was valid since the defendant did not establish nor even argue that any prejudice resulted therefrom. State v. Silcox, 103 Idaho 483, 650 P.2d 625 (1982), overruled on other grounds, State v. Flint, 114 Idaho 806, 761 P.2d 1158 (1988).

Although the county made no follow-up contacts and persons who failed to return completed questionnaires were not placed on the quarterly jury list, in violation of this section, where the appellants made no showing that the commissioners' failure to contact nonresponding potential jurors contributed to underrepresentation of Hispanics, an inference arose that an Hispanic person whose name appeared on the master jury list was as likely as the average person to return a completed juror qualification form. State v. Lopez, 107 Idaho 726, 692 P.2d 370 (Ct. App. 1984).

Computer Use.

Idaho's Uniform Jury Service and Selection Act (this chapter) does not preclude jury commissioners from delegating such ministerial duties as may be performed by a computer service; the use of computers has been recognized as beneficial to the goal of fair and impartial jury selection. Absent a showing that use of the computer service in any way adversely affected the random nature or objectivity of the jury selection process, no purported error by the jury commissioners would afford a basis to disturb the judgments of conviction. State v. Lopez, 107 Idaho 726, 692 P.2d 370 (Ct. App. 1984).

Qualification Forms.

The statutory procedures for following up on returned jury qualification forms do not improperly exclude Hispanics from juries. State v. Paz, 118 Idaho 542, 798 P.2d 1 (1990), cert. denied, 501 U.S. 1259, 111 S. Ct. 2911, 115 L. Ed. 2d 1074 (1991), overruled on other grounds, State v. Card, 121 Idaho 425, 825 P.2d 1081 (1991).

Cited in: Yount v. Boundary County, 118 Idaho 307, 796 P.2d 516 (1990).

RESEARCH REFERENCES

Am. Jur. — 38 Am. Jur. 2d, Grand Jury, §§ 3 to 6.

C.J.S. — 38A C.J.S., Grand Juries, § 38 et seq.

50A C.J.S., Juries, § 284 et seq.

2-209. Determination of qualification of prospective juror — Qualifications — Physician's certificate of disability. — (1) The ad-

ministrative district judge or administrative district judge's designee, upon request of the clerk or the jury commissioner or a prospective juror or on its own initiative, shall determine on the basis of information provided on the qualification questionnaire form or interview with the prospective juror or other competent evidence whether:

(a) The prospective juror is not qualified to serve on a jury because he or she is unable to read, speak, and understand the English language; or

(b) The prospective juror is disqualified from service on a jury because of a disability which renders the prospective juror incapable of performing satisfactory jury service. A person claiming this disqualification shall be required to submit a physician's certificate as to the disability, and the certifying physician is subject to inquiry by the court at its discretion.

(2) The clerk or the jury commissioner shall determine on the basis of information provided on the qualification questionnaire form or interview with the prospective juror or other competent evidence whether:

(a) The prospective juror is not qualified to serve on a jury because the person is not a citizen of the United States of America, eighteen (18) years of age, and a resident of the county; or

(b) The prospective juror is disqualified from serving on a jury because of a felony criminal conviction as provided by section 3, article VI, of the constitution of the state of Idaho, and who has not been restored to the rights of citizenship pursuant to section 18-310, Idaho Code, or other applicable law.

(3) A person who is disqualified from serving on a jury on the basis of any of the grounds set forth in subsections (1) and (2) of this section shall be excused from serving on a jury for a period of two (2) years following the disqualification. The administrative district judge, or a district judge or magistrate judge designated by the administrative district judge, may excuse a person disqualified under subsection (1)(b) of this section for a period of time greater than two (2) years, or may excuse such person permanently from serving on a jury. An order excusing such a person permanently or for a period of time greater than two (2) years shall be based upon a finding as to the nature and duration of the disability, based upon the information provided in the qualification questionnaire form, an interview with the prospective juror, or other competent evidence.

History.

1971, ch. 169, § 8, p. 799; am. 1972, ch. 8, § 1, p. 12; am. 1981, ch. 266, § 1, p. 565; am. 1996, ch. 189, § 1, p. 597; am. 2002, ch. 94, § 4, p. 256; am. 2005, ch. 190, § 6, p. 583.

STATUTORY NOTES

Effective Dates.

Section 2 of S.L. 1972, ch. 8 declared an emergency. Approved February 4, 1972.

JUDICIAL DECISIONS

Analysis

Qualifications.
Systematic underrepresentation of group.

Qualifications.

It would be patently unreasonable to require the state to utilize jurors who are not proficient in the English language, unable to understand testimony, directions of the court, or read exhibits and instructions; furthermore, it is not difficult to perceive that the state has a significant interest in the integrity of the jury system, and that that interest is manifestly and primarily advanced by limiting jurors to those who are capable of understanding the proceedings, and, as long as the qualification is equally administered as to all foreign language speakers, there is no constitutional infirmity in the requirement that jurors be competent in English. State v. Paz, 118 Idaho 542, 798 P.2d 1 (1990), cert. denied, 501 U.S. 1259, 111 S. Ct. 2911, 115 L. Ed. 2d 1074 (1991), overruled on other grounds, State v. Card, 121 Idaho 425, 825 P.2d 1081 (1991).

Systematic Underrepresentation of Group.

Even if the application of this section results in systematic underrepresentation of Hispanics as jurors, the jury selection system may still be upheld if the state shows that a significant state interest is manifestly and primarily advanced by those aspects of the jury selection process that result in the disproportionate exclusion of a distinctive group. State v. Paz, 118 Idaho 542, 798 P.2d 1 (1990), cert. denied, 501 U.S. 1259, 111 S. Ct. 2911, 115 L. Ed. 2d 1074 (1991), overruled on other grounds, State v. Card, 121 Idaho 425, 825 P.2d 1081 (1991).

Decisions Under Prior Law

Analysis

Challenge to panel.
Qualifications.
Qualifications as electors.

Challenge to Panel.

Disqualification of any individual juror is not ground for challenge to entire panel. State v. Cosler, 39 Idaho 519, 228 P. 277 (1924).

Qualifications.

The state is entitled to use voter registration and driver's license lists as a means of selecting jurors, and the state may establish minimum qualifications for jurors where the qualifications relate to the juror's competence to understand and administer the law. Mills v. Glennon, 2 Idaho 105, 6 P. 116 (1885).

Qualifications as Electors.

Jurors must have all qualifications of electors. Territory v. Evans, 2 Idaho 651, 23 P. 232 (1890), overruled on other grounds, State v. Potter, 6 Idaho 584, 57 P. 431 (1899).

A juror should possess the qualifications of an elector, but it does not follow that he need be registered as such, as registration does not go to his qualification but is merely a precaution to prevent fraud in election. Territory v. Evans, 2 Idaho 651, 23 P. 232 (1890), overruled on other grounds, State v. Potter, 6 Idaho 584, 57 P. 431 (1899).

Right to vote has no direct relation to jury duty; the two are not treated together in either the constitution or the statutes; one right is guaranteed by the constitution, the other is a duty. State v. Kelley, 39 Idaho 668, 229 P. 659 (1924).

RESEARCH REFERENCES

Am. Jur. — 38 Am. Jur. 2d, Grand Jury, §§ 10 to 14 et seq.
47 Am. Jur. 2d, Jury, § 142 et seq.

C.J.S. — 38A C.J.S., Grand Juries, §§ 11, 55, 70.
50A C.J.S., Juries, § 284 et seq.

2-210. Names placed in prospective jury panel — Summoning additional trial jurors — Names drawn to be public — Exception. — (1) The jury commission shall maintain a prospective jury panel and shall place therein the names or identifying numbers of all prospective jurors drawn from the master jury list who are not disqualified under section 2-209, Idaho Code.

(2) If there is an unanticipated shortage of available trial jurors drawn from a prospective jury panel, the court may require the sheriff to summon a sufficient number of trial jurors selected at random by the clerk from the

master jury list in a manner prescribed by the court. The jurors whose names are drawn from the master jury list shall be served with a summons and shall complete the qualification questionnaire form in the manner prescribed in section 2-208, Idaho Code.

History.
1971, ch. 169, § 9, p. 799; am. 1978, ch. 79, § 1, p. 154; am. 1990, ch. 213, § 4, p. 480; am. 2001, ch. 120, § 1, p. 413; am. 2002, ch. 94, § 5, p. 256; am. 2005, ch. 190, § 7, p. 583.

STATUTORY NOTES

Effective Dates.
Section 111 of S.L. 1990, ch. 213 as amended by § 16 of S.L. 1991, ch. 329 provided that §§ 3 through 45 and 48 through 110 of the act should take effect July 1, 1993 and that §§ 1, 2, 46 and 47 should take effect July 1, 1990.

JUDICIAL DECISIONS

Cited in: State v. Silcox, 103 Idaho 483, 650 P.2d 625 (1982); Yount v. Boundary County, 118 Idaho 307, 796 P.2d 516 (1990).

Decisions Under Prior Law

Analysis

Authority of court.
Irregularity in summoning jury.
Professional jurors.

Authority of Court.
The trial court observed the law and did not commit any error in directing the special panel to be summoned on authority of the court upon finding that additional jurors were necessary to complete the jury ordering a special venire returnable later that same day. State v. Davidson, 78 Idaho 553, 309 P.2d 211 (1957).

Irregularity in Summoning Jury.
Mere irregularity in procedure with regard to summoning grand jury by which indictment was found was not ground for quashing indictment, unless prejudice to substantial rights of defendant was shown. State v. Roberts, 33 Idaho 30, 188 P. 895 (1920); Rich v. Varian, 36 Idaho 355, 210 P. 1011 (1922).

Professional Jurors.
The conclusion of bias resting on the assertion that sheriff called "professional" jurors which was attempted to be grounded on an affidavit alleging an investigation made some six months previously having to do with the manner in which the sheriff selected special veniremen cannot be treated as proof that any such situation existed at the time of appellant's trial setting. State v. Davidson, 78 Idaho 553, 309 P.2d 211 (1957).

RESEARCH REFERENCES

Am. Jur. — 47 Am. Jur. 2d, Jury, § 112 et seq.

2-211. No exemptions. — No exemptions for any qualified prospective juror may be granted.

History.
1971, ch. 169, § 10, p. 799; am. 2005, ch. 190, § 8, p. 583.

2-212. Excusing or postponing jury service — Inquiry by court — Grounds for excusing or postponing. — (1) The court, or a member of the jury commission designated by the court, upon request of a prospective juror or on its own initiative, shall determine on the basis of information provided on the qualification questionnaire form or interview with the prospective juror or other competent evidence whether the prospective juror should be excused from jury service or have their jury service postponed. The clerk or the jury commissioner shall keep a record of this determination.

(2) A person who is seventy (70) years of age or older shall be permanently excused if the person indicates on the qualification questionnaire form that he or she wishes to be excused. A person who requests to be excused on this basis shall be reinstated to the master jury list by submitting a written request asking to be reinstated for jury service.

(3) A person who is not disqualified for jury service under section 2-209, Idaho Code, may have jury service postponed by the court or the jury commissioner only upon a showing of undue hardship, extreme inconvenience, or public necessity, or upon a showing that the juror is a mother breastfeeding her child.

(a) Any person requesting a postponement shall provide a written statement setting forth the reason for the request and the anticipated date that the reason will no longer exist.

(b) The court or the jury commissioner may require a person requesting a postponement for any medical reason to provide a statement from a medical provider supporting the request.

(c) The postponement, if granted, shall be for a period of time as the court or the jury commissioner deems necessary, at the conclusion of which the person shall reappear for jury service in accordance with the direction of the court or the jury commissioner.

History.
1971, ch. 169, § 11, p. 799; am. 1986, ch. 295, § 1, p. 742; am. 2002, ch. 94, § 6, p. 256; am. 2005, ch. 190, § 9, p. 583.

JUDICIAL DECISIONS

DECISIONS UNDER PRIOR LAW

Grand Jury.

Where a defendant was indicted for false pretense by a grand jury of 16, he was not prejudiced by the act of the judge in dismissing three members of a grand jury, one because of personal illness, and two because of the necessity of engaging in private employment, and appointing three additional individuals to the grand jury. State v. Dunn, 60 Idaho 568, 94 P.2d 779 (1939).

Excusing some of the members of the grand jury and substituting others leaving a jury of 16 does not show prejudice as an accused is not entitled to a particular grand juror. State v. Dunn, 60 Idaho 568, 94 P.2d 779 (1939).

RESEARCH REFERENCES

Am. Jur. — 47 Am. Jur. 2d, Jury, § 157 et seq.

C.J.S. — 50A C.J.S., Juries, §§ 347 to 349.

2-213. Stay of proceedings or quashing indictment for irregularity in selecting jury — Evidence in support of motion — Remedies

exclusive — Contents of records not to be disclosed. — (1) Within seven (7) days after the moving party discovered or by the exercise of diligence could have discovered the grounds therefor, and in any event before the trial jury is sworn to try the case, a party may move to stay the proceedings, and in a criminal case to quash the indictment, or for other appropriate relief, on the ground of substantial failure to comply with this chapter in selecting the grand or trial jury.

(2) Upon motion filed under subsection (1) of this section containing a sworn statement of facts which, if true, would constitute a substantial failure to comply with this chapter, the moving party is entitled to present in support of the motion the testimony of the jury commissioner or the clerk, any relevant records and papers not public or otherwise available used by the jury commissioner or the clerk, and any other relevant evidence. If the court determines that in selecting either a grand jury or a trial jury there has been a substantial failure to comply with this chapter, the court shall stay the proceedings pending the selection of the jury in conformity with this chapter, quash an indictment, or grant other appropriate relief.

(3) The procedures prescribed by this section are the exclusive means by which a person accused of a crime, the state, or a party in a civil case may challenge a jury on the ground that the jury was not selected in conformity with this chapter.

(4) The contents of any records or papers used by the jury commissioner or the clerk in connection with the selection process and not made public under section 2-206(4), Idaho Code, shall not be disclosed, except in connection with the preparation or presentation of a motion under subsection (1) of this section. The parties in a case may inspect, reproduce, and copy the records or papers at all reasonable times during the preparation and pendency of a motion under subsection (1) of this section.

History.
1971, ch. 169, § 12, p. 799; am. 2001, ch. 120, § 2, p. 413; am. 2005, ch. 190, § 10, p. 583.

JUDICIAL DECISIONS

Analysis

Burden of proof.
Challenge.
Constitutionality.
Sworn statement of facts.

Burden of Proof.

A party who contends purposeful discrimination occurred in the selection of a jury panel bears the burden of proving that contention. State v. Ruybal, 102 Idaho 885, 643 P.2d 835 (Ct. App. 1982).

Challenge.

This section requires that a motion challenging the composition of a jury be made within seven days after the discovery of grounds therefor and, in any event, before the jury is sworn to try the case; accordingly, where the defendant waited until the appeal of his conviction to make his first objection to the selection of the jury, the objection was untimely since the defendant did not use reasonable diligence in asserting his rights in the trial court. State v. Ruybal, 102 Idaho 885, 643 P.2d 835 (Ct. App. 1982).

While a constitutional challenge to the jury selection process must focus upon systematic underrepresentation of an identifiable group, like Hispanics, no such requirement applies to a statutory challenge; a challenge under the Uniform Jury Selection and Service Act (§ 2-201 et seq.) may be based broadly upon a showing that the statutory violation has sub-

stantially affected the random nature and objectivity of the process. State v. Lopez, 107 Idaho 726, 692 P.2d 370 (Ct. App. 1984).

Constitutionality.

Since this section provides civil litigants timely notice and a meaningful opportunity to be heard on issues relating to jury selection, it did not effect a denial of due process to require a litigant to present his challenge to the jury selection process within the provisions of this section and trial court properly denied litigant his motion for a new trial. Higuera v. Hiestand, 128 Idaho 700, 918 P.2d 284 (1996).

Sworn Statement of Facts.

The Uniform Jury Selection and Service Act's (§ 2-201 et seq.) remedial procedures afford the sole means for enforcing the act's substantive provisions; thus, where the appellants' challenge to the jury selection process was made by two unverified motions, one alleging an infringement of constitutional rights and the other alleging the improper delegation of functions to a computer service, and neither motion contained nor was accompanied by any "sworn statement of facts," as required by subsection (2) of this section, such omission was fatal to a statutory challenge to the jury. State v. Lopez, 107 Idaho 726, 692 P.2d 370 (Ct. App. 1984).

Cited in: State v. Pontier, 95 Idaho 707, 518 P.2d 969 (1974).

2-214. Retention period for papers and records. — All records and papers compiled and maintained by the jury commissioner or the clerk in connection with selection and service of jurors shall be preserved by the clerk for a minimum period of four (4) years and for any longer period ordered by the court.

History.

1971, ch. 169, § 13, p. 799; am. 1978, ch. 81, § 1, p. 155; am. 2005, ch. 190, § 11, p. 583.

2-215. Mileage and per diem of jurors. — A juror shall be paid mileage for his travel expenses from his residence to the place of holding court and return at the same rate per mile as established by resolution of the county commissioners for county employees in the county where the juror resides, and shall be compensated at the following rate, to be paid from the county treasury:

(1) Five dollars ($5.00) for each one-half (1/2) day, or portion thereof, unless the juror travels more than thirty (30) miles from his residence in which event he shall receive ten dollars ($10.00) for each one-half (1/2) day or portion thereof;

(2) Ten dollars ($10.00) for each day's required attendance at court of more than one-half (1/2) day.

History.

1971, ch. 169, § 14, p. 799; am. 1982, ch. 213, § 1, p. 587.

RESEARCH REFERENCES

Am. Jur. — 47 Am. Jur. 2d, Jury, § 100.
C.J.S. — 50A C.J.S., Juries, § 351.

2-216. Limitation on required jury service. — In any two (2) year period, or a longer period not to exceed five (5) years, as determined by the administrative judge of a judicial district, a person shall not be required:

(1) To serve or attend court for prospective service as a trial juror more than ten (10) court days, except if necessary to complete service in a particular case;

(2) To be available for jury service for a period to exceed six (6) months; provided however, that the administrative district judge for the judicial district in which a county is located may by order specify a shorter term of required availability for jury service;

(3) To serve on more than one (1) grand jury; or

(4) To serve as both a grand and trial juror.

Appearance for jury service, whether or not the roll is called, shall be credited toward required jury service. Appearance for jury service may include telephone standby as permitted by the administrative judge of the district.

History.
1971, ch. 169, § 15, p. 799; am. 1977, ch. 54, § 1, p. 105; am. 1978, ch. 83, § 1, p. 157; am. 2001, ch. 120, § 3, p. 413; am. 2002, ch. 94, § 7, p. 256.

RESEARCH REFERENCES

Am. Jur. — 47 Am. Jur. 2d, Jury, § 228 et seq.

2-217. Penalty for evasion of jury service. — A person summoned for jury service who fails to appear or to complete jury service as directed shall be ordered by the court to appear forthwith and show cause for his failure to comply with the summons. If he fails to show good cause for noncompliance with the summons, he is guilty of criminal contempt and upon conviction may be fined not more than three hundred dollars ($300) and imprisoned not more than three (3) days, or both.

History.
1971, ch. 169, § 16, p. 799; am. 2005, ch. 190, § 12, p. 583.

RESEARCH REFERENCES

Am. Jur. — 47 Am. Jur. 2d, Jury, § 157 et seq.

2-218. Employer prohibited from penalizing employee for jury service — Penalty — Action by discharged employee for lost wages. — (1) An employer shall not deprive an employee of his employment, or threaten or otherwise coerce him with respect thereto, because the employee receives a summons, responds thereto, serves as a juror, or attends court for prospective jury service.

(2) Any employer who violates subsection (1) of this section is guilty of criminal contempt and upon conviction may be fined not more than three hundred dollars ($300).

(3) If an employer discharges an employee in violation of subsection (1) of this section the employee within sixty (60) days may bring a civil action for

recovery of treble the amount of wages lost as a result of the violation and for an order requiring the reinstatement of the employee. If he prevails, the employee shall be allowed a reasonable attorney's fee fixed by the court.

History.
1971, ch. 169, § 17, p. 799; am. 1987, ch. 65, § 1, p. 116.

2-219. Delegation of authority by administrative judges. — Administrative judges are authorized to delegate their duties and responsibilities under this act to district judges or duly appointed magistrates within their respective district [districts].

History.
1971, ch. 169, § 18, p. 799; am. 1974, ch. 26, § 9, p. 804.

STATUTORY NOTES

Compiler's Notes.
For words "this act", see Compiler's Notes, § 2-201.

The bracketed word "districts" was inserted by the compiler.

2-220. Power of Supreme Court to make rules concerning juries. — The Supreme Court may make and amend rules, not inconsistent with this act, regulating the selection and service of jurors.

History.
1971, ch. 169, § 19, p. 799.

STATUTORY NOTES

Cross References.
Court rules regarding juries, Idaho Civil Procedure Rules 47(a) to 49(b).

Procedure for selection and impaneling of juries, Idaho Civil Procedure Rules 47(a) to 47(p).

Compiler's Notes.
For words "this act", see Compiler's Notes, § 2-201.

Section 20 of S.L. 1971, ch. 169, reads: "If any provision of this act or the application thereof to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of the act which can be given effect without the invalid provision or application, and to this end the provisions of this act are severable."

2-221. Construction of act. — This act shall be so applied and construed as to effectuate its general purpose to make uniform the law with respect to the subject of this act among those states which enact it.

History.
1971, ch. 169, § 22, p. 799.

STATUTORY NOTES

Compiler's Notes.
For words "this act", see Compiler's Notes, § 2-201.

Effective Dates.
Section 24 of S.L. 1971, ch. 169 declared an emergency. Approved March 20, 1971.

CHAPTER 3

JURY LIST

SECTION.
2-301 — 2-305. [Repealed.]

2-301 — 2-305. Jury lists. [Repealed.]

STATUTORY NOTES

Compiler's Notes.
These sections, which comprised C.C.P. 1881, §§ 82, 84, 85, 87, 88; R.S., R.C., & C.L., §§ 3947-3951; am. 1915, ch. 60; C.S., §§ 6524-6528; I.C.A., §§ 2-301 — 2-305; am. 1943, ch. 158, § 5, p. 320; am. 1951, ch. 191, §§ 1, 2, p. 406, were repealed by S.L. 1971, ch. 169, § 23. For present law, see § 2-201 et seq.

CHAPTER 4

DRAWING AND SUMMONING JURORS

SECTION.
2-401 — 2-417. [Repealed.]

2-401 — 2-417. Drawing and summoning jurors. [Repealed.]

STATUTORY NOTES

Compiler's Notes.
These sections, which comprised C.C.P. 1881, §§ 89-104; R.S. §§ 3952-3967; am. 1899, p. 335, § 1; reen. R.C., & C.L., §§ 3942-3967; am. 1913, ch. 30, p. 128; C.S., §§ 6529-6544; I.C.A., §§ 2-401 — 2-416; am. 1943, ch. 158, § 6, p. 320; am. 1963, ch. 84, § 2, p. 277; am. 1969, ch. 109, § 103; I.C., § 2-417, as added by 1969, ch. 235, § 1, p. 748, were repealed by S.L. 1971, ch. 169, § 23. For present law, see § 2-201 et seq.

CHAPTER 5

IMPANELING JURIES

SECTION.
2-501. Grand jury — Impaneling on order of judge.
2-502. Grand jury — How constituted — Quorum.
2-503. Grand jury — How impaneled.
2-504 — 2-507. [Repealed.]
2-508. Impaneling of juries of inquest.

2-501. Grand jury — Impaneling on order of judge. — Grand juries shall not hereafter be drawn, summoned or required to attend at the sittings of any court within the state, as provided by law, unless the district judge as assigned by the administrative judge shall so order in writing. The order shall be filed with the clerk of the court and a copy of the order shall be delivered to the jury commission and prosecuting attorney.

History.
R.S., § 3968; reen. 1899, p. 125, § 7; reen. R.C. & C.L., § 3968; C.S., § 6545; I.C.A., § 2-501; am. 2002, ch. 94, § 8, p. 256.

STATUTORY NOTES

Cross References.

Definition of grand jury, § 2-103.

Grand jury may be summoned upon order of district court, Idaho Const. art. 1, § 8.

Procedure regarding grand jury, Idaho Criminal Rule 6.1.

Uniform Jury Selection and Service Act, § 2-201 et seq.

JUDICIAL DECISIONS

ANALYSIS

Constitutionality.
Discretion of court.
Grand jury denied.
Number of jurors.

Constitutionality.

This section does not offend Idaho Const. art. 1, § 8, which provides for prosecution by indictment or information. State v. Barber, 13 Idaho 65, 88 P. 418 (1907).

Discretion of Court.

The decision not to call a grand jury falls within the judge's discretionary authority; such a decision will not be disturbed unless an abuse of discretion has occurred. Parsons v. Idaho State Tax Comm'n, 110 Idaho 572, 716 P.2d 1344 (Ct. App. 1986).

Grand Jury Denied.

The district court did not abuse its discretion in denying the defendant's request for a grand jury where the court found the defendant's claims against the state tax commission to be without merit, and the defendant did not make any showing that he was barred from the alternative remedy of presenting his evidence to the prosecutor or to the state attorney general's office. Parsons v. Idaho State Tax Comm'n, 110 Idaho 572, 716 P.2d 1344 (Ct. App. 1986).

Number of Jurors.

Section 2-103 and this section require 16 men to constitute grand jury. Less number will not constitute legal body. State v. Roberts, 33 Idaho 30, 188 P. 895 (1920).

It was the intention of the legislature (§ 2-502) that business of grand jury might be carried on without the presence of entire 16 members. Rich v. Varian, 36 Idaho 355, 210 P. 1011 (1922).

RESEARCH REFERENCES

Am. Jur. — 38 Am. Jur. 2d, Grand Jury, § 1 to 2.

C.J.S. — 38A C.J.S., Grand Juries, § 1 et seq.

2-502. Grand jury — How constituted — Quorum. — Sixteen (16) persons shall constitute a grand jury, twelve (12) of whom shall constitute a quorum, and when of the jurors summoned, no more nor less than sixteen (16) attend they shall constitute the grand jury. If more than sixteen (16) attend the clerk shall call over the list summoned, and the sixteen (16) first answering shall constitute the grand jury. If less than sixteen (16) attend, the panel may be filled to sixteen (16).

History.

C.C.P. 1881, § 106; R.S., R.C., & C.L., § 3969; C.S., § 6546; I.C.A., § 2-502; am. 2009, ch. 11, § 1, p. 14.

STATUTORY NOTES

Amendments.

The 2009 amendment, by ch. 11, deleted "as provided in section 2-410" from the end.

JUDICIAL DECISIONS

ANALYSIS

Application of section.
Substitution of jurors.

Application of Section.

When more than 12 jurors were present when the indictment was found, there was a quorum present under the language of this section. State v. Bullis, 93 Idaho 749, 472 P.2d 315 (1970).

Substitution of Jurors.

Where a defendant was indicted for false pretenses by a grand jury of 16, he was not prejudiced by the act of the judge in dismissing three members of a grand jury, one because of illness, and two because of necessity of engaging in private employment, and appointing three additional individuals to the grand jury. State v. Dunn, 60 Idaho 568, 94 P.2d 779 (1939).

Excusing some of the members of the grand jury and substituting others leaving a jury of 16 does not show prejudice; an accused is not entitled to a particular grand juror. State v. Dunn, 60 Idaho 568, 94 P.2d 779 (1939).

Cited in: State v. Roberts, 33 Idaho 30, 188 P. 895 (1920); Rich v. Varian, 36 Idaho 355, 210 P. 1011 (1922).

RESEARCH REFERENCES

Am. Jur. — 38 Am. Jur. 2d, Grand Jury, § 15.

2-503. Grand jury — How impaneled. — Thereafter such proceedings shall be had in impaneling the grand jury as are prescribed by the criminal practice.

History.

C.C.P. 1881, § 107; R.S., R.C., & C.L., § 3970; C.S., § 6547; I.C.A., § 2-503.

STATUTORY NOTES

Cross References.

Formation of grand jury, § 19-1001 et seq.

Powers and duties of grand jury, § 19-1101 et seq.

Rules of court regarding grand jury, Idaho Criminal Rule 6.1.

2-504, 2-505. Trial jurors — Procedure at time order made returnable — Manner of impaneling jury. [Repealed.]

STATUTORY NOTES

Compiler's Notes.

These sections, which comprised C.C.P. 1881, §§ 108, 109; R.S., R.C., & C.L., §§ 3971, 3972; C.S., §§ 6548, 6549; I.C.A., §§ 2-504, 2-505, were repealed by S.L. 1975, ch. 242, § 1. For present rule, see Idaho Civil Procedure Rules 47(a) to 47(p).

2-506. Impaneling jury in probate or justice's court. [Repealed.]

STATUTORY NOTES

Compiler's Notes.

This section, which comprised R.S., R.C., & C.L., § 3973; C.S., § 6550; I.C.A., § 2-506, was repealed by S.L. 1969, ch. 111, § 14.

2-507. Impaneling juries — Criminal cases — Civil cases. [Repealed.]

STATUTORY NOTES

Compiler's Notes.
This section, which comprised C.C.P. 1881, § 111; R.S., R.C., & C.L., § 3974; C.S., § 6551; I.C.A., § 2-507, was repealed by S.L. 1969, ch. 111, § 15.

2-508. Impaneling of juries of inquest. — The mode and manner of impaneling juries of inquest are provided for in the provisions of the different statutes relating to such inquests.

History.
C.C.P. 1881, § 112; R.S., R.C., & C.L., § 3975; C.S., § 6552; I.C.A., § 2-508.

STATUTORY NOTES

Cross References.
Juries of inquest, § 19-4301.

CHAPTER 6

FEES AND MILEAGE OF JURORS

SECTION.
2-601 — 2-603. [Repealed.]

2-601 — 2-603. Fees and mileage of jurors. [Repealed.]

STATUTORY NOTES

Compiler's Notes.
Sections 2-601 and 2-603, which comprised R.S., §§ 6136, 6138; R.C., §§ 6136, 6138; C.L., §§ 3976, 3978; C.S., §§ 6553, 6555; am. 1927, ch. 62, § 1, p. 78; I.C.A., §§ 2-601, 2-603; am. 1933, ch. 17, § 1, p. 23; am. 1953, ch. 88, § 1, p. 118; am. 1957, ch. 144, § 1, p. 244; am. 1969, ch. 147, § 1, p. 472, were repealed by S.L. 1971, ch. 169, § 23.

Section 2-602, which comprised R.S., § 6137; am. 1893, p. 65, § 1; een. 1899, p. 180, § 1; R.C., § 6137; C.L., § 3977; C.S., § 6554; I.C.A., § 2-602; am. 1953, ch. 88, § 2, p. 118; am. 1957, ch. 144, § 2, p. 244; am. 1969, ch. 147, § 2, p. 472, was repealed by S.L. 1969, ch. 11, § 21.

TITLE 3

ATTORNEYS AND COUNSELORS AT LAW

CHAPTER 1

ADMISSION TO PRACTICE

3-101. Persons entitled to admission. — Any individual who is of the age of majority, of good moral character, and who possesses the necessary qualifications of learning and ability may, under such rules as the Supreme Court may prescribe, be admitted as an attorney and counselor in all courts of this state.

History.

I.C., § 3-101, as added by 1974, ch. 41, § 3, p. 1078; am. 1985, ch. 189, § 1, p. 487.

STATUTORY NOTES

Cross References.

Board of commissioners of Idaho state bar, duties concerning admission to practice law, § 3-408.

Clerk of Supreme Court may not practice as attorney or counselor, § 1-406.

Judge or justice not to act as attorney or counsel, §§ 1-1802, 1-1803.

Judge not to have law partner, § 1-1804.

Prosecuting attorney, restrictions on right to practice law, § 31-2606.

Prior Laws.

Former § 3-101, which comprised C.C.P. 1881, § 113; R.S., § 3990; am. 1897, p. 57, § 1; reen. 1899, p. 302, § 1; reen. R.C. & C.L., § 3990; C.S., § 6565; am. 1929, ch. 63, § 1, p. 92; I.C.A., § 3-101; am. 1949, ch. 73, § 1, p. 126, was repealed by S.L. 1974, ch. 41, § 1.

JUDICIAL DECISIONS

Cited in: Kyle v. Beco Corp., 109 Idaho 267, 707 P.2d 378 (1985).

Decisions Under Prior Law

Analysis

Admission without examination.
Constitutionality of statutes.
Nature of right to practice.
Nonresidents.
Qualifications of applicants.

Admission Without Examination.

Where statute provided that applicants for the bar shall be admitted by the supreme court without being required to pass a written examination, upon proof of good moral character, said statute was mandatory and not directory. In re Kaufman, 69 Idaho 297, 206 P.2d 528 (1949).

Constitutionality of Statutes.

Statute which required supreme court to admit to the bar any graduate of certified law school upon furnishing proof of good moral character was unconstitutional as an invasion of the judicial function to prescribe maximum qualifications for applicants for the bar. In re Kaufman, 69 Idaho 297, 206 P.2d 528 (1949).

Any legislation, which attempts to require courts to admit candidates for bar on standards other than accepted or established by the court, is unconstitutional, as an invasion of the judicial power, and a violation of the constitution establishing separate branches of government. In re Kaufman, 69 Idaho 297, 206 P.2d 528 (1949).

Nature of Right to Practice.

The right to practice a profession has been held in this state not to be a property right; it is a privilege or franchise, and the privilege to practice a profession is a valuable one which may only be revoked by the proper exercise of the police power. In re Edwards, 45 Idaho 676, 266 P. 665 (1928); Craft v. Balderston, 58 Idaho 650, 78 P.2d 122 (1938).

The right to practice law is a privilege and the admission or exclusion of persons from the right is a judicial power. In re Edwards, 45 Idaho 676, 266 P. 665 (1928); In re Lavin, 59 Idaho 197, 81 P.2d 727 (1938).

Nonresidents.

Statute that provided what persons were entitled to admission to the bar and supreme court rule regarding admission to the bar did not contemplate the admission of nonresidents of this state to the bar; the privilege of nonresident attorneys to appear in the courts of Idaho is granted as a courtesy. Mason v. Pelkes, 57 Idaho 10, 59 P.2d 1087, cert. denied, 299 U.S. 615, 57 S. Ct. 319, 81 L. Ed. 453 (1936); Cleek v. Virginia Gold Mining & Milling Co., 63 Idaho 445, 122 P.2d 232 (1942).

Qualifications of Applicants.

Determination of mental and moral qualifications of applicants for the bar has long been a judicial function. In re Kaufman, 69 Idaho 297, 206 P.2d 528 (1949).

Legislature has the power to provide minimum qualifications for applicants to the bar, but it is the inherent right of the court to prescribe the maximum qualifications for applicants to the bar, and no legislature can force the courts to accept any candidate for the bar until the courts are themselves satisfied that such qualifications are sufficient. In re Kaufman, 69 Idaho 297, 206 P.2d 528 (1949).

RESEARCH REFERENCES

A.L.R. — Procedural due process requirements in proceedings involving applications for admission to bar. 2 A.L.R.3d 1266.

Criminal record as affecting applicant's moral character for purposes of admission to the bar. 88 A.L.R.3d 193.

Violation of draft laws as affecting character for purposes of admission to the bar. 88 A.L.R.3d 1055.

Failure to pay creditors as affecting applicant's moral character for purposes of admission to the bar. 4 A.L.R.4th 436.

Sexual conduct or orientation as ground for denial of admission to bar. 21 A.L.R.4th 1109.

Falsehoods, misrepresentations, impersonations, and other irresponsible conduct as bearing on requisite good moral character for admission to bar. 30 A.L.R.4th 1020.

Admission as affected by alcohol abuse, 39 A.L.R.4th 567.

Sexual conduct or orientation as ground for denial of admission to bar. 105 A.L.R.5th 217.

Falsehoods, misrepresentations, impersonations, and other irresponsible conduct as bearing on requisite good moral character for admission to bar. 107 A.L.R.5th 167.

Failure to pay creditors as affecting applicant's moral character for purposes of admission to the bar. 108 A.L.R.5th 289.

Criminal record as affecting applicant's moral character for purposes of admission to the bar. 3 A.L.R.6th 49.

3-102. Oath. — Every person, before receiving license to practice law, shall take the oath prescribed by law.

History.

C.C.P. 1881, § 116; R.S., R.C., & C.L., § 3993; C.S., § 6568; I.C.A., § 3-102; am. 1949, ch. 283, § 2, p. 582; am. 1951, ch. 90, § 1, p. 162.

STATUTORY NOTES

Compiler's Notes.
This section was made a rule of court by order of supreme court dated March 19, 1951 which order was rescinded by order of supreme court dated October 24, 1974.

Effective Dates.
Section 2 of S.L. 1951, ch. 90 declared an emergency. Approved March 6, 1951.

JUDICIAL DECISIONS

Cited in: Anderson v. Coolin, 27 Idaho 334, 149 P. 286 (1915).

RESEARCH REFERENCES

A.L.R. — Validity, construction and effect of reciprocity provisions for admission to bar of attorney admitted to practice in another jurisdiction. 14 A.L.R.4th 7.

3-103. Roll of attorneys. — The clerk of the Supreme Court must keep a roll of attorneys and counselors admitted to practice by the court, which roll must be signed by the person admitted before he receives a license.

History.
C.C.P. 1881, § 118; R.S. & R.C., § 3995; compiled and reen. C.L., § 3995; C.S., § 6570; I.C.A., § 3-103.

STATUTORY NOTES

Compiler's Notes.
This section was made a rule of court by order of supreme court dated March 19, 1951 which order was rescinded by order of supreme court dated October 24, 1974.

Revised Code, § 3995 was amended by implication by S.L. 1909, p. 109, abolishing admission by district court.

JUDICIAL DECISIONS

Representation Pro Se.
The inherent right of a natural person to represent himself pro se does not extend to representation of other persons or corporations. Weston v. Gritman Mem. Hosp., 99 Idaho 717, 587 P.2d 1252 (1978).

Cited in: Anderson v. Coolin, 27 Idaho 334, 149 P. 286 (1915).

3-104. Practicing without license a contempt — Exception. — If any person shall practice law or hold himself out as qualified to practice law in this state without having been admitted to practice therein by the Supreme Court and without having paid all license fees now or hereafter prescribed by law for the practice of law he is guilty of contempt both in the Supreme Court and district court for the district in which he shall so practice or hold himself out as qualified to practice. Provided, that any person may appear and act in a magistrate's division of a district court as representative of any party to a proceeding therein so long as the claim does not total more than $300, and so long as he or his employer has no pecuniary interest in the outcome of the litigation, and that he shall do so without making a charge or collecting a fee therefor.

History.
C.C.P. 1881, § 119; R.S., R.C., & C.L., § 3996; C.S., § 6571; am. 1929, ch. 63, § 3, p. 92; I.C.A., § 3-104; am. 1969, ch. 278, § 1, p. 821.

STATUTORY NOTES

Cross References.
Contempt in general, § 7-601 et seq.
Unlawful practice, penalty, § 3-420.

Effective Dates.
Section 2 of S.L. 1969, ch. 278 provided that the act should become effective at 12:01 A.M. on January 11, 1971.

JUDICIAL DECISIONS

Analysis

Attitude of party.
Attorney required.
Attorneys from other states.
Contempt for illegal practice.
Corporations practicing law.
Former judges.
Practice of law defined.
Purpose of contempt proceeding.
Small claims exception.
Software programs.
Unlawful practice of law.

Attitude of Party.
One of objects of contempt proceedings is to punish the wrongdoer and his attitude, and circumstances of aggravation or mitigation are pertinent to that purpose. Idaho State Bar v. Meservy, 80 Idaho 504, 335 P.2d 62 (1959).

Attorney Required.
A business entity, such as a corporation, limited liability company, or partnership, must be represented by a licensed attorney before an administrative body or a judicial body. Indian Springs LLC v. Indian Springs Land Inv., LLC, 147 Idaho 737, 215 P.3d 457 (2009), cert. denied, 176 L. Ed. 3d 121, 130 S. Ct. 1512(2010).

Buyers were prohibited from representing a partnership and a limited liability company (LLC) in a pro se capacity and the court dismissed all claims the buyers made on behalf of the partnership and LLC, as these business entities had not made an appropriate appearance or argument before the court. Indian Springs LLC v. Indian Springs Land Inv., LLC, 147 Idaho 737, 215 P.3d 457 (2009), cert. denied, 176 L. Ed. 3d 121, 130 S. Ct. 1512(2010).

Attorneys from Other States.
Attorney from another state was entitled to recover for services in probate court (now district court) in Idaho, although he had not been admitted to practice in Idaho. Freeling v. Tucker, 49 Idaho 475, 289 P. 85 (1930).

Contempt for Illegal Practice.
Fact that respondent in contempt proceeding for practicing without a license did not sign papers and pleadings prepared by him as an attorney does not relieve him of the charge of engaging in the practice of law. In re Brainard, 55 Idaho 153, 39 P.2d 769 (1924).

Corporations Practicing Law.
Where a trust company holds itself out as qualified to draft wills and trust declarations, it is guilty of illegally representing itself as qualified to practice law. In re Eastern Idaho Loan & Trust Co., 49 Idaho 280, 288 P. 157 (1930).

Agreement by corporation to furnish county expert legal services of bond attorneys to aid in the issue of bonds which the corporation agreed to buy constituted "illegal practice of law" and a contempt of court for which a nominal fine of $500.00 was imposed. Wayne v. Murphey-Favre & Co., 56 Idaho 788, 59 P.2d 721 (1936).

Former Judges.
Ex-probate judge who advised clients in probate matters and prepared legal documents for compensation was guilty of illegally practicing law. In re Brainard, 55 Idaho 153, 39 P.2d 769 (1924).

Practice of Law Defined.
This section is aimed at unadmitted and unlicensed practitioners functioning either within or without the courts. In re Eastern

Idaho Loan & Trust Co., 49 Idaho 280, 288 P. 157 (1930).

Where an instrument is to be shaped from a mass of facts and conditions, the legal effect of which must be carefully determined by a mind trained in the existing laws in order to insure a specific result and to guard against others, a charge for such service brings it within the term "practice of law." In re Eastern Idaho Loan & Trust Co., 49 Idaho 280, 288 P. 157 (1930).

The practice of law consists in performing services in court in any matter pending therein, the giving of legal advice, and the preparation of instruments and contracts by which legal rights are secured. In re Matthews, 58 Idaho 772, 79 P.2d 535 (1938).

Notary public merely filling blanks in printed forms of deeds, mortgages, bills of sale, and the like is not within the last clause of this section. In re Matthews, 58 Idaho 772, 79 P.2d 535 (1938).

Purpose of Contempt Proceeding.

The primary purpose of contempt and injunction proceedings in cases involving the unlawful practice of law is to protect the public against unskilled and unauthorized would-be practitioners. Idaho State Bar v. Meservy, 80 Idaho 504, 335 P.2d 62 (1959).

Small Claims Exception.

Although not rising to the level of a constitutional right, there appears to be a statutory right under this section to avail oneself of lay assistance in certain civil small claims actions. State v. Harrold, 113 Idaho 938, 750 P.2d 959 (Ct. App.), cert. denied, 116 Idaho 467, 776 P.2d 829 (1988).

Small claims exception, allowing lay representation in civil claims not exceeding $300, did not apply to traffic infraction proceedings, and, therefore, magistrate properly refused to permit defendant's nonlawyer father to represent her on charges of following too closely. State v. Bettwieser, 143 Idaho 582, 149 P.3d 857 (Ct. App. 2006), cert. denied, 128 S. Ct. 441, 169 L. Ed. 2d 308 (2007).

Software Programs.

Advising a debtor filing for bankruptcy of available exemptions from which to choose, or actually choosing an exemption for the debtor with no explanation, requires the exercise of legal judgment beyond the capacity and knowledge of lay persons, and plugging in solicited information from questionnaires and personal interviews to a pre-packaged bankruptcy software program constitutes the unauthorized practice of law. In re Farness, 244 Bankr. 464 (Bankr. D. Idaho 1999).

Unlawful Practice of Law.

The drafting of the documents alleged to have been prepared by defendant, a former probate judge, or the giving of advice and counsel with respect thereto, by one not a licensed attorney at law, would constitute an unlawful practice of law, whether or not a charge was made therefor; even though the documents or advice were not actually employed in the action or proceeding pending in court. Idaho State Bar v. Meservy, 80 Idaho 504, 335 P.2d 62 (1959).

Where an attorney, who had been suspended from the practice of law, filed complaints and other papers which gave the false impression that he was a practicing attorney, his actions constituted unlawful practice of the law. In re Depew, 98 Idaho 215, 560 P.2d 886 (1977).

When a credit cardholder's husband, who was not a licensed attorney, represented the cardholder in a dispute with a bank, the husband engaged in the unauthorized practice of law. Citibank (South Dakota), N.A. v. Carroll, — Idaho —, 220 P.3d 1073 (2009).

Cited in: Anderson v. Coolin, 27 Idaho 334, 149 P. 286 (1915); Wayne v. Murphey-Favre & Co., 56 Idaho 788, 59 P.2d 721 (1936); Cleek v. Virginia Gold Mining & Milling Co., 63 Idaho 445, 122 P.2d 232 (1942); White v. Idaho Forest Indus., 98 Idaho 784, 572 P.2d 887 (1977); Idaho State Bar Ass'n v. Idaho Pub. Utils. Comm'n, 102 Idaho 672, 637 P.2d 1168 (1981).

RESEARCH REFERENCES

Am. Jur. — 7 Am. Jur. 2d, Attorneys-at-Law, § 70 et seq.

C.J.S. — 7 C.J.S., Attorney and Client, § 26 et seq.

A.L.R. — Handling, preparing, presenting or trying workmen's compensation claims or cases as practice of law. 2 A.L.R.3d 724.

Maintenance of lawyer reference system by organization having no legal interest in proceedings. 11 A.L.R.3d 1206.

Representation of another before state public utilities service commission as involving practice of law. 13 A.L.R.3d 812.

Activities of law clerks as illegal practice of law. 13 A.L.R.3d 1137.

Drafting of will or other estate-planning activities as illegal practice of law. 22 A.L.R.3d 1112.

Operations of collection agency as unauthorized practice of law. 27 A.L.R.3d 1172.

What activities of stock or security broker constitute unauthorized practice of law. 34 A.L.R.3d 1305.

Sale of books or forms designed to enable

layman to achieve legal results without assistance of attorney as unauthorized practice of law. 71 A.L.R.3d 1000.

Liability of professional corporation of lawyers, or individual members thereof, for malpractice or other tort of another member. 39 A.L.R.4th 556.

What constitutes "unauthorized practice of law" by out-of-state counsel? 83 A.L.R.5th 497.

Unauthorized practice of law — Real estate closings. 119 A.L.R.5th 191.

3-105. Right to take examination for admission. [Repealed.]

STATUTORY NOTES

Compiler's Notes.
This section, which comprised S.L. 1949, ch. 73, § 2, p. 126, was repealed by S.L. 1974, ch. 41, § 2.

CHAPTER 2

RIGHTS AND DUTIES OF ATTORNEYS

3-201. Duties of attorneys. — In addition to such duties as the Supreme Court may by rule prescribe, it is the duty of the attorney and counselor:

1. To support the constitution and laws of the United States and of this state.

2. To maintain the respect due to the courts of justice and judicial officers.

3. To counsel or maintain such actions, proceedings or defenses only as appear to him legal or just, except the defense of a person charged with a public offense.

4. To employ, for the purpose of maintaining the causes confided to him, such means only as are consistent with truth, and never seek to mislead the judges by an artifice or false statement of fact or law.

5. To maintain inviolate the confidence, and at every peril to himself, to preserve the secrets of his clients.

6. To abstain from all offensive personality, and to advance no fact prejudicial to the honor or reputation of a party or witness, unless required by the justice of the cause with which he is charged.

7. Not to encourage either the commencement or the continuance of an action or proceeding from any motive of passion or interest.

8. Never to reject for any consideration personal to himself, the cause of the defenseless or the oppressed.

History.
C.C.P. 1881, § 120; R.S., R.C., & C.L., § 3997; C.S., § 6572; am. 1929, ch. 63, § 4, p. 92; I.C.A., § 3-201.

STATUTORY NOTES

Cross References.
Board of commissioners of Idaho state bar, duty to formulate rules governing conduct of persons admitted to practice law, § 3-408.

Misbehavior or wilful neglect of attorney as contempt, § 7-601.

Witness fees not allowed to attorney in cause, § 9-1604.

JUDICIAL DECISIONS

ANALYSIS

Construction.
Remedy for violation of trust.
Statute of limitations.

Construction.

Provisions of statute are as broad as any requirements that court could ordinarily prescribe in exercise to its inherent power. In re Clifton, 33 Idaho 614, 196 P. 670 (1921).

It is difficult to define just what is meant by duty to support the constitution and laws of United States as provided for in subdivision 1; but mere unethical conduct is not included, since courts do not attempt to give standards of ethics the force and effect of law. In re Clifton, 33 Idaho 614, 196 P. 670 (1921).

Remedy for Violation of Trust.

Where an attorney is employed by a person to secure real property belonging to the client and in the course of such employment and, before the employment terminates, such attorney secures a supposed interest in such property and repudiates his fiduciary obligation and receives in his own name the title to such property that he has been employed to secure for his client, such title will be declared to be held in trust for the use and benefit of the client. Ainsworth v. Harding, 22 Idaho 645, 128 P. 92 (1912).

Statute of Limitations.

The form of action which a client would have against his attorney for negligence would be in tort, and the statute of limitations applicable to tort actions will apply. Trimming v. Howard, 52 Idaho 412, 16 P.2d 661 (1932).

Cited in: In re Bradley, 14 Idaho 784, 96 P. 208 (1908); Anderson v. Coolin, 27 Idaho 334, 149 P. 286 (1924); In re Downs, 46 Idaho 464, 268 P. 17 (1928); Pichon v. Benjamin, 108 Idaho 852, 702 P.2d 890 (Ct. App. 1985).

RESEARCH REFERENCES

Am. Jur. — 7 Am. Jur. 2d, Attorneys-at-Law, § 137 et seq.

C.J.S. — 7A C.J.S., Attorney and Client, § 131 et seq.

A.L.R. — Attorney's personal liability for expenses incurred in relation to service for client. 66 A.L.R.4th 256.

Attorneys at law: disciplinary proceedings for drafting instrument such as will or trust under which attorney-drafter or member of attorney's family or law firm is beneficiary, grantee, legatee, or devisee. 80 A.L.R.5th 597.

3-202. Authority of attorney. — An attorney and counselor has authority:

1. To bind his client in any of the steps of an action or proceeding, by his agreement filed with the clerk, or entered upon the minutes of the court, and not otherwise.

2. To receive money claimed by his client in an action or proceeding during the pendency thereof, or after judgment, unless a revocation of his authority is filed, and upon the payment thereof, and not otherwise, to discharge the claim or acknowledge satisfaction of the judgment.

History.

C.C.P. 1881, § 121; R.S., R.C., & C.L., § 3998; C.S., § 6573; I.C.A., § 3-202.

JUDICIAL DECISIONS

ANALYSIS

Authority of attorney in general.
Compromise.

Death of client.
Duties in general.
Presumption of authorization.
Stipulations.

Authority of Attorney in General.

An attorney-at-law has authority, by virtue of his employment as such, to do in behalf of his client all acts in or out of court necessary or incidental to the prosecution and management of a suit or action. Storey v. United States Fid. & Guar. Co., 32 Idaho 388, 183 P. 990 (1919).

There is no difference in power and authority of attorney employed by county commissioners on contingent basis and ordinary relationship of attorney and client. Barnard v. Young, 43 Idaho 382, 251 P. 1054 (1926).

Provision regarding attorney's authority to bind client was inapplicable to agreement of attorney for judgment debtor regarding execution sale. Evans v. Power County, 50 Idaho 690, 1 P.2d 614 (1931).

In an action on an injunction bond given in a suit to enjoin collection of a judgment, a cross-complaint alleging merely that the attorneys for the judgment creditor in the injunction suit had offered in behalf of their client to deed the judgment creditors' property to the judgment debtor, if the judgment debtor thought that it could thereby recoup their losses, was demurrable, since under the statute an attorney can bind his client in an action or proceeding only if the agreement is filed with clerk or entered upon the minutes of the court. Idaho Gold Dredging Corp. v. Boise Payette Lumber Co., 62 Idaho 683, 115 P.2d 401 (1941).

This section was not intended to enlarge or abridge the authority of the attorney, but only to prescribe the manner of its exercise, by requiring the agreement to be filed with the clerk or entered upon the minutes. Muncey v. Children's Home Finding & Aid Soc'y, 84 Idaho 147, 369 P.2d 586 (1955).

Compromise.

Where the authority of an attorney extends no further than his employment in a case, he is without implied authority by virtue of such employment to compromise his client's claim or cause of action, except in possible cases of an emergency. Storey v. United States Fid. & Guar. Co., 32 Idaho 388, 183 P. 990 (1919).

An attorney employed to prosecute or defend one action has no authority, by virtue of such employment, to compromise another action. Storey v. United States Fid. & Guar. Co., 32 Idaho 388, 183 P. 990 (1919).

Death of Client.

When the client dies the agency of the attorney ceases. McCornick v. Shaughnessy, 19 Idaho 465, 114 P. 22 (1911).

Duties in General.

A lawyer is an officer of the court — a minister in the temple of justice; his calling demands fidelity to clients and an eye single to their best interests as well as good faith and honorable dealing with the courts and the public. In re Burns, 55 Idaho 190, 40 P.2d 105 (1935).

It is the duty of attorney to act with complete fairness, honesty, loyalty and fidelity in all of his dealings with his client, and he is bound to the utmost good faith in dealing with him. Benting v. Spanbauer, 58 Idaho 44, 69 P.2d 983 (1937).

Presumption of Authorization.

Where counsel for defendant entered into stipulations finally disposing of road construction case, but client raised question of authorization of attorney to enter into the stipulations, it would be presumed that counsel had authorization; but it was a rebuttable presumption, and the court should hear evidence as to authorization. Howell v. Reimann, 77 Idaho 84, 288 P.2d 649 (1955).

Stipulations.

Subdivision 1 of this section has no application to stipulations or agreements between counsel with reference to matters not involved in the pending litigation. Storey v. United States Fid. & Guar. Co., 32 Idaho 388, 183 P. 990 (1919).

Attorney's authority to make stipulations binding client is such that relief from it rests in the sound discretion of the trial court. State ex rel. Graham v. Enking, 59 Idaho 321, 82 P.2d 649 (1938).

A stipulation between counsel entered upon the minutes of the court is generally deemed binding upon the parties. Savage Lateral Ditch Water Users Ass'n v. Pulley, 125 Idaho 237, 869 P.2d 554 (1994).

RESEARCH REFERENCES

Am. Jur. — 7 Am. Jur. 2d, Attorneys-at-Law, § 137 et seq.

C.J.S. — 7A C.J.S., Attorney and Client, § 61 et seq.

3-203. Change of attorney. — The attorney in an action or special proceeding may be changed at any time before judgment or final determination as follows:

1. Upon his own consent, filed with the clerk, or entered upon the minutes.

2. Upon the order of the court or judge thereof, upon the application of the client, after notice to the attorney.

History.
C.C.P. 1881, § 122; R.S., R.C., & C.L., § 3999; C.S., § 6574; I.C.A., § 3-203.

STATUTORY NOTES

Compiler's Notes.
This section was made a rule of court by order of the a supreme court dated March 19, 1951, which order was rescinded by order of the supreme court dated October 24, 1974 and appears to have been abrogated, affected or covered in part by Idaho Civil Procedure Rules 11(b)(1) to 11(b)(4).

JUDICIAL DECISIONS

Analysis

Appeal from order.
Change after judgment.
Change at beginning of trial.
Payment of compensation.
Ratification.

Appeal from Order.
An application for a change of attorneys to which objection is made by the attorney is a special proceeding, the final judgment made on which is reviewable on appeal to the supreme court. Curtis v. Richards, 4 Idaho 434, 40 P. 57 (1895).

Change After Judgment.
After final judgment, a party who appeals may employ new counsel or change his attorney without notice, and the provisions of this and the following sections do not apply in such cases. Lydon v. Piper, 5 Idaho 541, 51 P. 101 (1897).

Change at Beginning of Trial.
Withdrawal of attorney's appearance for one of two joint defendants, at beginning of trial, is permissible under this section. Bogue Supply Co. v. Davis, 36 Idaho 249, 210 P. 577 (1922).

Payment of Compensation.
As a general rule, an order changing attorney will not be made unless fees or compensation earned by the attorney is paid or facts are made to appear by the party moving for the change which show that this is impossible in the given case. Curtis v. Richards, 4 Idaho 434, 40 P. 57 (1895).

Ratification.
Ratification by the client of the unauthorized act of his attorney can not be inferred in the absence of knowledge of all of the material facts on the part of the client. Storey v. United States Fid. & Guar. Co., 32 Idaho 388, 183 P. 990 (1919).

Cited in: Smith-Nieland v. Reed, 39 Idaho 788, 231 P. 102 (1924).

RESEARCH REFERENCES

Am. Jur. — 7 Am. Jur. 2d, Attorneys-at-Law, § 184.

C.J.S. — 7A C.J.S., Attorney and Client, § 277 et seq.

3-204. Notice of change. — When an attorney is changed, as provided in the last section, written notice of the change and of the substitution of a new attorney, or of the appearance of the party in person, must be given to

the adverse party; until then, he must recognize the former attorney.

History.
C.C.P. 1881, § 123; R.S., R.C., & C.L., § 4000; C.S., § 6575; I.C.A., § 3-204.

STATUTORY NOTES

Compiler's Notes.
This section was made a rule of court by order of the supreme court dated March 19, 1951, which order was rescinded by order of the supreme court dated October 24, 1974, and appears to have been abrogated, affected or covered in part by Idaho Civil Procedures Rules 11(b)(1) to 11(b)(4).

JUDICIAL DECISIONS

Appeal.
After final judgment, a party who appeals may employ new counsel or change his attorney without notice. Lydon v. Piper, 5 Idaho 541, 51 P. 101 (1897).

Cited in: Smith-Nieland v. Reed, 39 Idaho 788, 231 P. 102 (1924).

3-205. Attorneys' fees — Lien. — The measure and mode of compensation of attorneys and counselors at law is left to the agreement, express or implied, of the parties, which is not restrained by law. From the commencement of an action, or the service of an answer containing a counterclaim, the attorney who appears for a party has a lien upon his client's cause of action or counterclaim, which attaches to a verdict, report, decision or judgment in his client's favor and the proceeds thereof in whosoever hands they may come; and can not be affected by any settlement between the parties before or after judgment.

History.
C.C.P. 1881, § 692; R.S. & R.C., § 4900; am. 1911, ch. 167, p. 563; reen. C.L., § 4000a; C.S., § 6576; I.C.A., § 3-205.

STATUTORY NOTES

Cross References.
Logging lien, foreclosure, attorney's fees recoverable as costs, § 45-413.
Mechanic's liens, foreclosure, attorney's fees recoverable as costs, § 45-513.
Railroads, suit for damages against, attorney's fees recoverable as costs, § 62-409.
Wages, suit for, attorney's fees recoverable as costs, § 45-605.
Worker's compensation, attorney fees, fixing of, § 72-804.

JUDICIAL DECISIONS

ANALYSIS

Agreement to pay fees.
Appeal.
Bankruptcy.
Construction and application.
Contingent fees.
Counties.
Discharge of lien.
Divorce actions.
Filing of claim.
Foreclosure of mortgage.
Funds held by court.

Lien.
Multiple legal actions.
Non-fund lien.
Priority of lien.
Purpose.
Reasonableness.
Satisfaction of lien.

Agreement to Pay Fees.

Where, in signing a promissory note, the defendant had agreed that in case a suit or action to collect the note was instituted he would "pay such sum as the court may adjudge reasonable as attorney fees in such suit or action," the plaintiff was entitled to recover attorney fees in an action to collect the funds due on the promissory note. Sherwood & Roberts, Inc. v. Riplinger, 103 Idaho 535, 650 P.2d 677 (1982).

Appeal.

Upon affirming a judgment, the supreme court awarded additional attorney's fees and directed the trial court to add the amount thereof to plaintiff's judgment. Twin Harbors Lumber Co. v. Carrico, 92 Idaho 343, 442 P.2d 753 (1968).

Bankruptcy.

Attorneys who claimed they were owed fees for services they performed for a husband and wife (debtors) and for a business were not allowed to recover those fees from proceeds a Chapter 7 trustee derived when he sold real property the debtors and the business owned, even though the attorneys had filed charging liens against the property, because the attorneys had not reduced their claims to judgments before they filed their liens. Hopkins v. Thomason Farms, Inc. (In re Thomason), Case No. 03-42400, 2009 Bankr. LEXIS 1769 (Bankr. D. Idaho June 24, 2009).

Construction and Application.

The common law rule of champerty does not prevail in this state; the compensation of attorneys is left to the agreement of the parties, and, when such agreement is not contrary to good morals or sound public policy, it will be enforced by the courts. Merchants Protective Ass'n v. Jacobsen, 22 Idaho 636, 127 P. 315 (1912).

Where defendant served several corporations both as general counsel and general manager, he had no common-law attorney's lien on the records of such corporations for payment of fees, assuming such liens were not replaced by this section, since his relationship with the corporations was not only as an attorney, but also as general manager of each of them. Silver Bowl, Inc. v. Equity Metals, Inc., 93 Idaho 487, 464 P.2d 926 (1970).

No valid attorney's lien was ever created upon a corporation's books and records where the former legal counsel for the corporation attempted to use such a lien to recover compensation for managerial services rendered to the corporation, and totally unrelated to the legal services performed by him. Nancy Lee Mines, Inc. v. Harrison, 93 Idaho 652, 471 P.2d 39 (1970).

The plain language of this section allows only for a lien in favor of a lawyer against the lawyer's own client. Elsaesser v. Raeon, 235 Bankr. 476 (Bankr. D. Idaho 1999).

Contingent Fees.

Contingent fees have generally been held a legitimate method of compensation, so long as they are reasonable. Barnard v. Young, 43 Idaho 382, 251 P. 1054 (1926).

Counties.

The legislature cannot require a county to pay costs and attorney's fees in civil private litigation to which the county is not a party. Bear Lake County v. Budge, 9 Idaho 703, 75 P. 614 (1904).

There is nothing in statutes which places counties in any different category than individuals in employment of attorneys. Barnard v. Young, 43 Idaho 382, 251 P. 1054 (1926).

Discharge of Lien.

Attorney's lien can be discharged only by payment, express agreement backed by consideration, or laches. Hansbrough v. D.W. Standrod & Co., 43 Idaho 119, 249 P. 897 (1926).

This section gives a lien on any judgment or the proceeds thereof and can not be affected by any settlement by the parties before or after judgment; it can only be discharged by payment and it is not lost as against the judgment debtor though he pay the judgment without actual notice of the lien. Renfro v. Nixon, 55 Idaho 532, 45 P.2d 595 (1935), overruled in part, Frazee v. Frazee, 104 Idaho 463, 660 P.2d 928 (1983).

Divorce Actions.

Action of divorce may be continued after condonation of parties for purpose of enforcing lien of attorney for services rendered in suit. Taylor v. Taylor, 33 Idaho 445, 196 P. 211 (1921).

Where decree did not require husband to pay fees of wife's attorney, the court could not fix fees of attorneys in the proceeding or place a lien for such fees on real estate in which wife had an interest. Heslip v. Heslip, 74 Idaho 368, 262 P.2d 999 (1953).

Filing of Claim.

Attorney was not required to file an independent action but could file his claim of attorney's lien in connection with the principal case. Frazee v. Frazee, 104 Idaho 463, 660 P.2d 928 (1983).

An attorney may assert a claim of entitlement to a fee and a claim of entitlement to collect the fee from a particular fund in the same case where the client's action against a third party is adjudicated, unless some prejudice would result from doing so. Knight Ins., Inc. v. Knight, 109 Idaho 56, 704 P.2d 960 (Ct. App. 1985).

Attorney was not entitled to a lien on funds paid by an insurance company to the insured where the attorney had not filed a claim or counter claim, but settled with the insurance company before filing suit. Kenneth F. White, Chtd. v. St. Alphonsus Reg'l Med. Ctr., 136 Idaho 238, 31 P.3d 926 (Ct. App. 2001).

Foreclosure of Mortgage.

The action to foreclose a mortgage given to secure several notes is a separate and distinct action and but one fee can be allowed in such action; the fee to be allowed is the one stipulated by the mortgage to be reasonable. Lewis v. Sutton, 21 Idaho 541, 122 P. 911 (1912).

Attorney's lien for services in foreclosure suit attached to land after mortgage foreclosure sale and purchase by administratrix, who was judgment creditor and sole legatee, because land became proceeds of judgment. Miller v. Monroe, 50 Idaho 726, 300 P. 362 (1931).

Funds Held by Court.

Where law firm sought to enforce attorney's lien against client, the fact that funds were held by court rather than actually received by the client did not bar enforcement, since this section contemplates that funds available for distribution by judicial order are subject to attorney's lien. Skelton v. Spencer, 102 Idaho 69, 625 P.2d 1072, cert. denied, 454 U.S. 894, 102 S. Ct. 390, 70 L. Ed. 2d 208 (1981).

Lien.

An attorney has no lien for fees for appearance on behalf of the state. State v. National Sur. Co., 29 Idaho 670, 161 P. 1026 (1916).

Application of plaintiff's attorneys for an order granting them a lien upon prospective judgment is to protect them in the payment of their fees in the event the plaintiff should recover judgment. Allen v. General Ins. Co., 42 F.2d 901 (D. Idaho 1930).

Where attorneys brought suit for, inter alia, a lien on a check made payable to their client, depositing check with clerk of court was not such release of possession as to destroy their lien thereon. Keane v. McFee, 75 Idaho 541, 275 P.2d 960 (1954).

An attorney's charging lien did not exist in Idaho at common law; however, such has been codified in Idaho by this section. Frazee v. Frazee, 104 Idaho 463, 660 P.2d 928 (1983).

The charging lien of an attorney is equitable in nature and triable to the court. The equitable source of the charging lien necessitates that an attorney take affirmative steps in an adjudicative process to perfect and reduce his lien to a judgment or order of the court. Frazee v. Frazee, 104 Idaho 463, 660 P.2d 928 (1983).

The attorney who represented the plaintiffs in a 42 USC § 1983 action had a valid claim of lien; however, there could be no adjudication that the attorney had a valid lien in any amount until it was first determined that some amount was owing from the plaintiffs to the attorney in addition to those fees already paid. Jarman v. Hale, 112 Idaho 270, 731 P.2d 813 (Ct. App. 1986) Jarman v. Hale, 122 Idaho 952, 842 P.2d 288 (Ct. App. 1992).

Multiple Legal Actions.

Where law firm had entered into written agreement with client regarding fees for three separate but interrelated legal actions, firm was entitled to enforce its lien under this section by petition in any one of the actions pending after proper notice was given to the client. Skelton v. Spencer, 102 Idaho 69, 625 P.2d 1072, cert. denied, 454 U.S. 894, 102 S. Ct. 390, 70 L. Ed. 2d 208 (1981).

Non-Fund Lien.

Although the language of this section grants an automatic lien on a "fund" created by the efforts of an attorney, as long as certain elements are satisfied, a valid lien might also arise in a non-fund situation, provided a court properly adjudicates the lien and perfects it by judgment. Elsaesser v. Raeon, 235 Bankr. 476 (Bankr. D. Idaho 1999).

Priority of Lien.

Attorney's lien results on proceeds of judgment of foreclosure on behalf of insolvent bank, obtained before insolvency and is prior lien to that of depositors and other creditors of bank. Fralick v. Coeur d'Alene Bank & Trust Co., 35 Idaho 749, 208 P. 835 (1922).

Attorney's lien on corporate stock was not lost by owner of stock pledging it for a preexisting debt, although pledgee was without notice of the lien. Hansbrough v. D.W. Standrod & Co., 49 Idaho 216, 286 P. 923 (1930).

Purpose.

The purpose of this section is to secure payment for legal services rendered by allowing the attorney an interest in the fruits of his skill and labors. Jarman v. Hale, 112 Idaho 270, 731 P.2d 813 (Ct. App. 1986) Jarman v. Hale, 122 Idaho 952, 842 P.2d 288 (Ct. App. 1992).

Reasonableness.

Attorney for wife in divorce action could not, when client failed to pay his fee, levy against the property of the husband, who was a total stranger to the contract under which fee was claimed, without the necessity of proving the reasonableness of the claimed fees in an adjudicative proceeding. Frazee v. Frazee, 104 Idaho 463, 660 P.2d 928 (1983).

Satisfaction of Lien.

In suit to enforce lien for fees of $750 in foreclosure suit, agreement with his client to accept minimum fee of $75.00 in event of failure to redeem, states a good defense. Benting v. Spanbauer, 58 Idaho 44, 69 P.2d 983 (1937).

Where defendant secured satisfaction of a judgment by subterfuge without knowledge of plaintiff's attorneys, defendant was liable for his attorney's fees. Updegraff v. Adams, 66 Idaho 795, 169 P.2d 501 (1946).

Cited in: In re May, 96 Idaho 858, 538 P.2d 787 (1975); Ustick v. Ustick, 104 Idaho 215, 657 P.2d 1083 (Ct. App. 1983); Maguire, Ward, Maguire & Eldredge v. Idaho Ins. Guar. Ass'n, 112 Idaho 166, 730 P.2d 1086 (Ct. App. 1986); Cole v. Kunzler, 115 Idaho 552, 768 P.2d 815 (Ct. App. 1989).

RESEARCH REFERENCES

Am. Jur. — 7 Am. Jur. 2d, Attorneys-at-Law, § 239 et seq.

C.J.S. — 7A C.J.S., Attorney and Client, § 443 et seq.

A.L.R. — Attorney's splitting fees with other attorney or layman as ground for disciplinary proceedings. 6 A.L.R.3d 1446.

Advances, validity and propriety of arrangement by which attorney pays or advances expenses of client. 8 A.L.R.3d 1155.

Right of attorney admitted in one state to recover compensation for services rendered in another state where he was not admitted to the bar. 11 A.L.R.3d 907.

Personal liability of executor or administrator for fees of attorney employed by him for benefit of the estate. 13 A.L.R.3d 518.

Construction of contingent fee contract as regards compensation for services after judgment or on appeal. 13 A.L.R.3d 673.

Contract for attorney's compensation made after inception of attorney-client relationship, validity and effect. 13 A.L.R.3d 701.

Infant's liability for services rendered by attorney-at-law under contract with him. 13 A.L.R.3d 1251.

Attorney's right to compensation as affected by disbarment or suspension before complete performance. 24 A.L.R.3d 1193.

Time from which interest begins to run on fee or disbursements owed by client to attorney. 29 A.L.R.3d 824.

Attorney's death prior to final adjudication or settlement of case as affecting compensation under contingent fee contract. 33 A.L.R.3d 1375.

Amount of attorneys' compensation in absence of contract or statute fixing amount. 57 A.L.R.3d 475.

Amount of attorneys' compensation in matters involving guardianship and trusts. 57 A.L.R.3d 550.

Amount of attorneys' fees in tort actions. 57 A.L.R.3d 584.

Amount of attorneys' compensation in proceedings involving wills and administration of decedents' estates. 58 A.L.R.3d 315.

Right of party who is attorney and appears for himself to award of attorney's fees against opposing party as element of costs. 78 A.L.R.3d 1119.

Excessiveness or adequacy of attorneys' fees in domestic relations cases. 17 A.L.R.5th 366.

Excessiveness or inadequacy of attorneys' fees in matters involving commercial and general business activities. 23 A.L.R.5th 241.

Calculation of attorneys' fees under Federal Tort Claims Act — 28 USCS § 2678. 87 A.L.R. Fed. 866.

3-206. Notice to appoint another attorney. [Repealed.]

STATUTORY NOTES

Compiler's Notes.

This section, which comprised C.C.P. 1881, § 124; R.S., R.C., & C.L., § 4001; C.S., § 6577; I.C.A, § 3-206; am. 1957, ch. 86, § 1, p. 136, was repealed by S.L. 1975, ch. 242, § 1. For present rule, see Idaho Civil Procedure Rules 11(b)(1) to 11(b)(4).

CHAPTER 3
DISBARMENT

3-301. Grounds. — An attorney and counselor may be removed, suspended, or reprimanded by the Supreme Court and by the district court for either of the following causes arising after his admission to practice:

1. His conviction of a felony or misdemeanor involving moral turpitude, in which case the record of conviction is conclusive evidence.

2. Wilful disobedience or violation of an order of the court, requiring him to do or forbear an act connected with or in course of his profession, and any violation of the oath taken by him or his duties as such attorney and counselor.

3. Corruptly and without authority appearing as attorney for a party to an action or proceeding.

4. Lending his name to be used as an attorney and counselor by any other person who is not an attorney and counselor.

5. Failure for ten (10) days after written demand, and payment or tender of the fees and expenses due him from his client to pay over or deliver any money or other property belonging to his client which he shall have received in his office of attorney or counselor in the course of collection or settlement of any claim or demand.

6. Habitual intemperance to such an extent that it disqualifies such attorney from faithfully discharging the duties devolving upon him; and in all cases where an attorney is removed or suspended by a district court the judgment or order of removal or suspension may be reviewed on appeal by the Supreme Court.

History.
C.C.P. 1881, § 125; R.S., § 4002; am. 1897, p. 55, § 1; reen. 1889, p. 302, § 1; reen. R.C. & C.L., § 4002; C.S., § 6578; am. 1929, ch. 63, § 5, p. 92; I.C.A., § 3-301.

STATUTORY NOTES

Cross References.
Board of commissioners of Idaho state bar, duties concerning disbarment, § 3-408.

Compiler's Notes.
This section was made a rule of court by order of supreme court dated March 19, 1951 which order was rescinded by order of supreme court dated October 24, 1974.

JUDICIAL DECISIONS

ANALYSIS

Conviction of crime.
Deceit and breach of confidential relations.
Failure to pay over money.
False personation.
Lending name.
Moral turpitude.
Object and nature of proceeding.
Prior civil or criminal proceedings not prerequisite.
Procuring license on false affidavit.
Representing conflicting interests.
Settlement with client not a defense.
Support of constitution and laws.
Suspension pending hearing.

Bar Commissioners Cautioned.

It behooves the court and bar commissioners to exercise the greatest care and diligence in order that no injustice be done in the performance of their respective duties. In re Felton, 60 Idaho 540, 94 P.2d 166 (1939).

Charge of Offense.

Where the charge of a criminal offense is not connected in any way with defendant's office as attorney, it is generally held that courts should not enter a judgment of disbarment except upon conviction of a felony or misdemeanor involving moral turpitude. In re Baum, 32 Idaho 676, 186 P. 927 (1920).

Where an indictable crime consisting of a violation of professional duty is charged against an attorney, the court will entertain disbarment proceedings independent of any prosecution or conviction. In re Edwards, 45 Idaho 676, 266 P. 665 (1928).

Charges Not Sustained.

Charges against attorney were not sustained, and there was not sufficient proof to warrant the recommendation that petitioner be disbarred. In re Felton, 60 Idaho 540, 94 P.2d 166 (1939).

Charges Sustained.

In proceeding before the discipline committee of the state bar commission, conclusion that licensed attorney had violated this section subsequent to findings that attorney had used credit card without consent or authorization of the owner, had been convicted of driving while under the influence of intoxicating liquor, had issued a check without sufficient funds, and had failed to file a state income tax return was sufficient and indefinite suspension of attorney, with privilege of applying for reinstatement upon certain conditions after six months, was held to be appropriate discipline. In re Padgett, 95 Idaho 141, 504 P.2d 814 (1972).

Constitutionality.

This provision does not contravene Idaho Const., art. 1, § 6, on the ground that it inflicts cruel or unusual punishment. In re Henry, 15 Idaho 755, 99 P. 1054 (1909).

Conviction of Crime.

This section does not require that the conviction be had in a court of record; on the contrary, it impliedly contemplates that some of the convictions embraced within its terms may be had in inferior courts. In re Henry, 15 Idaho 755, 99 P. 1054 (1909).

Guilt or innocence of crime of which record of conviction is shown is not in issue in disbarment proceeding. In re Kerl, 32 Idaho 737, 188 P. 40 (1920).

Conviction in California of crime involving moral turpitude justifies disbarment in Idaho. In re Mills, 71 Idaho 128, 227 P.2d 81 (1951).

The suspension of an attorney who was convicted of federal income tax evasion from practice for a period of nine months and the imposition of a $1000 fine was not unduly harsh. In re Snook, 94 Idaho 904, 499 P.2d 1260 (1972).

A conviction based upon a plea of nolo contendere to a charge of federal income tax evasion is such a conviction of a felony that subjects attorney to removal, suspension or reprimand. In re Snook, 94 Idaho 904, 499 P.2d 1260 (1972).

Deceit and Breach of Confidential Relations.

Deceit and breach of confidential relations violates this section and justifies suspension for one year. In re Carter, 59 Idaho 547, 86 P.2d 162 (1938).

Failure to Pay Over Money.

Attorney who retains entire amount collected when he is only entitled to one-half of it violates subdivision 5 of this section. In re Burns, 55 Idaho 190, 40 P.2d 105 (1935).

Subdivision 5 of this section does not require a law firm to pay a client money to which he is not entitled; accordingly, where a law firm had knowledge of the fact that its client had assigned to a creditor certain proceeds that he hoped to realize from his suit against an insurance company, the firm was required to honor the assignment, and the firm acted improperly when, after receiving the settlement proceeds from the insurance company, it paid them over to its client. Bo-

nanza Motors, Inc. v. Webb, 104 Idaho 234, 657 P.2d 1102 (Ct. App. 1983).

False Personation.

Fact that an attorney employed about certain matters relating to desert-land entries in the United States land office corruptly persuaded another to personate one who had prior thereto made a desert-land entry at said land office was ground for disbarment. In re Badger, 4 Idaho 66, 35 P. 839 (1894).

Lending Name.

Subdivision 4 applies to regularly admitted resident attorneys of the state who, with knowledge, permit the use of their names by persons who have not been admitted, resulting in such unauthorized persons appearing as attorneys and counselors in the courts. Anderson v. Coolin, 27 Idaho 334, 149 P. 286 (1915).

Moral Turpitude.

Moral turpitude is an act of baseness, vileness or depravity in the private and social duties which a man owes to his fellowmen, or to society in general, contrary to the accepted and customary rule of right and duty between man and man; and, thus, a conviction on the charges of petit larceny is construed as an act of moral turpitude. In re Henry, 15 Idaho 755, 99 P. 1054 (1909).

The crime of aiding another to avoid registration, by advising young men, subject to registration, not to register for military service, as required by act of congress, thereby seeking to interfere with the government in its efforts to raise an army in time of war, involves moral turpitude. In re Hofstede, 31 Idaho 448, 173 P. 1087 (1918). See also In re Kerl, 32 Idaho 737, 188 P. 40 (1920).

Whether or not offense involves moral turpitude is for determination of court. In re Dampier, 46 Idaho 195, 267 P. 452 (1928).

"Felony or misdemeanor involving moral turpitude" as used in this section is intended to include only crimes involving moral turpitude under laws of this state. In re Dampier, 46 Idaho 195, 267 P. 452 (1928).

It is not required that an attorney be free from every vice, and a single act of immorality, not affecting his professional integrity, is not sufficient to justify his disbarment. In re Dampier, 46 Idaho 195, 267 P. 452 (1928).

Conviction under United States statute for sending obscene letters through the mail does not necessarily involve moral turpitude in offense, when viewed in light of state legislation. In re Dampier, 46 Idaho 195, 267 P. 452 (1928). See also In re Downs, 46 Idaho 464, 268 P. 17 (1928).

Drawing check without funds is crime involving moral turpitude because fraud is element thereof. In re Mills, 71 Idaho 128, 227 P.2d 81 (1951).

This section does not require conviction of a felony involving moral turpitude because "moral turpitude" modifies misdemeanor rather than felony. In re Snook, 94 Idaho 904, 499 P.2d 1260 (1972).

Object and Nature of Proceeding.

A disbarment proceeding is not a criminal action nor its purpose the punishment of the attorney, but it is intended to protect the public and those charged with the administration of justice. In re Wourms, 31 Idaho 291, 170 P. 919 (1918); In re Kerl, 32 Idaho 737, 188 P. 40 (1920); In re Carter, 59 Idaho 547, 86 P.2d 162 (1938).

Disbarment proceeding is not a lawsuit between parties litigant; it is in the nature of an inquest or inquiry as to the conduct of the accused. It is not a criminal proceeding, but one of a civil nature. In re Baum, 32 Idaho 676, 186 P. 927 (1920).

Prior Civil or Criminal Proceedings Not Prerequisite.

A prior civil action or criminal proceeding looking to the redressing of the injured person's wrongs, or the punishment of the attorney against whom the charges are made, is not a condition precedent to the prosecution of disbarment proceedings. In re Burns, 55 Idaho 190, 40 P.2d 105 (1935).

Procuring License on False Affidavit.

An applicant who makes a false affidavit, stating his admission to the highest court of another state, and, upon such affidavit, procures his admission to practice in the courts of this state, will be disbarred. In re Bradley, 14 Idaho 784, 96 P. 208 (1908).

Representing Conflicting Interests.

It is improper for a village attorney to bring an action against the village, but where attorney acts in good faith while doing so, there is no cause for disbarment. In re Baum, 32 Idaho 676, 186 P. 927 (1920).

Fact that an attorney represented conflicting interests in an action is not grounds for disbarment, where he acted in good faith, without improper or corrupt motives, and no injury resulted to his client. In re Baum, 32 Idaho 676, 186 P. 927 (1920).

Settlement with Client Not a Defense.

A settlement between the attorney and his client is no defense in a proceeding for disbarment. In re Burns, 55 Idaho 190, 40 P.2d 105 (1935).

Support of Constitution and Laws.

It is difficult to define just what is meant by supporting laws and constitution of United States, but it has been concluded to mean the duty to obey laws of land under our constitutional form of government. In re Clifton, 33 Idaho 614, 196 P. 670 (1921) (certain acts

committed and opinions expressed during the late war held not ground for disbarment).

Suspension Pending Hearing.

An attorney will not be suspended from his privileges as such pending the hearing on disbarment charges preferred against him. State v. Goode, 4 Idaho 730, 44 P. 640 (1896).

Cited in: State v. Campbell, 70 Idaho 408, 219 P.2d 956 (1950).

RESEARCH REFERENCES

Am. Jur. — 7 Am. Jur. 2d, Attorneys-at-Law, § 29 et seq.

C.J.S. — 7A C.J.S., Attorney and Client, § 61 et seq.

A.L.R. — Attorney's splitting fees with other attorney or layman as ground for disciplinary proceeding. 6 A.L.R.3d 1446.

Conflicting interests, what constitutes representation of, subjecting attorney to disciplinary action. 17 A.L.R.3d 835.

Attorney's right to compensation as affected by disbarment or suspension before complete performance. 24 A.L.R.3d 1193.

Publication and distribution of announcement of new or changed associations or addresses, change of firm name, or the like as ground for disciplinary action. 53 A.L.R.3d 1261.

Disciplinary proceeding based upon attorney's naming of himself or associate as executor or attorney for executor in will drafted by him. 57 A.L.R.3d 703.

Pardon as defense to disbarment of attorney. 59 A.L.R.3d 466.

Entrapment as a defense in proceedings to revoke or suspend license to practice law or medicine. 61 A.L.R.3d 357.

Use in disbarment proceedings of testimony given by attorney in criminal proceeding under grant of immunity. 62 A.L.R.3d 1145.

Federal income tax conviction as involving moral turpitude warranting disciplinary action against attorney. 63 A.L.R.3d 476.

Federal income tax conviction as constituting nonprofessional misconduct warranting disciplinary action against attorney. 63 A.L.R.3d 512.

Rights and duties of attorney in a criminal prosecution where client informs him of intention to present perjured testimony. 64 A.L.R.3d 385.

Power of court to order restitution for wronged client in disciplinary proceeding against attorney. 75 A.L.R.3d 307.

Effect of acquittal or dismissal in criminal prosecution as barring disciplinary action against attorney. 76 A.L.R.3d 1028.

Disciplinary action against attorney prior to exhaustion of appellate review of conviction. 76 A.L.R.3d 1061.

Failure to communicate with client as basis for disciplinary action against attorney. 80 A.L.R.3d 1240.

Disciplinary action against attorney or accountant for misconduct related to preparation of tax returns for others. 81 A.L.R.3d 1140.

Disbarment or suspension of attorney in one state as affecting right to continue to practice in another state. 81 A.L.R.3d 1281.

Restricting access to records of disciplinary proceedings against attorneys. 83 A.L.R.3d 749.

Discovery or inspection of state bar records, of complaints against or investigations of attorneys. 83 A.L.R.3d 777.

Attorney's charging excessive fee as ground for disciplining action. 11 A.L.R.4th 133.

Attorney's failure to attend court, or tardiness, as contempt. 13 A.L.R.4th 122.

Advertising as ground for disciplining attorney. 30 A.L.R.4th 742.

Bringing of frivolous claim or action as ground for disciplining attorney, 85 A.L.R.4th 544.

Attorneys at law: disciplinary proceedings for drafting instrument such as will or trust under which attorney-drafter or member of attorney's family or law firm is beneficiary, grantee, legatee, or devisee. 80 A.L.R.5th 597.

3-302. Conviction of crime — Transmission of record to Supreme Court. — In case of the conviction of an attorney or counselor of a felony or misdemeanor involving moral turpitude, the clerk of the court in which a conviction is had, must, within thirty (30) days thereafter, transmit to the Supreme Court a certified copy of the record of conviction.

History.

C.C.P. 1881, § 126; R.S., R.C., & C.L., § 4003; C.S., § 6579; I.C.A., § 3-302.

STATUTORY NOTES

Compiler's Notes.
This section was made a rule of court by order of supreme court dated March 19, 1951 which order was rescinded by order of supreme court dated October 24, 1974.

JUDICIAL DECISIONS

Conviction in Federal Court.
This section is not obligatory upon federal courts or their officers; failure to conform to it does not interfere with the power and duty of the court to proceed upon its own motion or otherwise in disbarment cases, whenever facts justifying such action are brought to its attention. In re Hofstede, 31 Idaho 448, 173 P. 1087 (1918).

RESEARCH REFERENCES

Am. Jur. — 7 Am. Jur. 2d, Attorneys-at-Law, § 40 et seq.

C.J.S. — 7A C.J.S., Attorney and Client, § 61 et seq.

3-303. Proceedings. — The proceedings to remove, suspend or reprimand an attorney and counselor shall be such as the Supreme Court may by rule prescribe.

History.
C.C.P. 1881, § 127; R.S., R.C., & C.L., § 4004; C.S., § 6580; am. 1929, ch. 63, § 6, p. 92; I.C.A., § 3-303.

STATUTORY NOTES

Cross References.
Board of commissioners of Idaho state bar, procedure in disciplinary proceedings, §§ 3-412 to 3-416.

Compiler's Notes.
This section was made a rule of court by order of supreme court dated March 19, 1951 which order was rescinded by order of supreme court dated October 24, 1974.

JUDICIAL DECISIONS

Analysis

Conviction of crime.
Costs.
Suspension pending hearing.
Trial based on charges.

Conviction of Crime.
Where an indictable crime is charged against an attorney, the supreme court will not proceed in disbarment proceedings until criminal proceedings have been taken in the district court, or until sufficient time has elapsed to accord the proper authorities opportunity to prosecute the case in that court. In re Tipton, 4 Idaho 513, 42 P. 504 (1895).

Where an attorney-at-law, admitted to practice in Idaho, has been convicted of a crime involving moral turpitude and a certified copy of the record of his conviction has been filed in the supreme court with a view to bringing about his disbarment, his guilt or innocence is not in issue. In re Kerl, 32 Idaho 737, 188 P. 40 (1920).

Where an indictable crime consisting of violation of professional duty is charged against an attorney, the court will entertain disbarment proceedings independent of any prosecution or conviction. In re Edwards, 45 Idaho 676, 266 P. 665 (1928).

When attorney is convicted of crime involving moral turpitude in courts of the state, it is duty of clerk to transmit certified copy of record of conviction to supreme court and the record of conviction is conclusive; whether offense involves moral turpitude is for determination of court. In re Dampier, 46 Idaho

195, 267 P. 452 (1928).

Costs.
There is no authority for allowing costs against attorney in disbarment proceedings. In re Carter, 59 Idaho 547, 86 P.2d 162 (1938).

Suspension Pending Hearing.
An attorney will not be suspended from his privileges as such pending the hearing on disbarment charges preferred against him. State v. Goode, 4 Idaho 730, 44 P. 640 (1896).

Trial Based on Charges.
Trial of an attorney in disbarment proceedings can be had only on charges contained in the information or rule. In re Edwards, 45 Idaho 676, 266 P. 665 (1928).

Cited in: In re Downs, 46 Idaho 464, 268 P. 17 (1928); In re Felton, 60 Idaho 540, 94 P.2d 166 (1939).

RESEARCH REFERENCES

Am. Jur. — 7 Am. Jur. 2d, Attorneys-at-Law, § 32 et seq.

C.J.S. — 7A C.J.S., Attorney and Client, § 61 et seq.

CHAPTER 4

BOARD OF COMMISSIONERS OF THE IDAHO STATE BAR

SECTION.

3-401. Purpose of chapter. — Recognizing that the practice of the legal profession is a privilege granted by the state and not a natural right of the individual, it is deemed necessary as a matter of business policy and in the interests of the public to provide laws and provisions covering the granting of that privilege and its subsequent use, control and regulation to the end that the public shall be properly protected against unprofessional, improper and unauthorized practice of law and unprofessional conduct of members of the bar.

History.
1923, ch. 211, § 1, p. 343; I.C.A., § 3-401.

JUDICIAL DECISIONS

ANALYSIS

Constitutionality.
Good faith.
Purpose.

Constitutionality.

S.L. 1923, ch. 211 was held unconstitutional on the grounds that its title was delusive and misleading, and that it was a special act creating a corporation. Jackson v. Gallet, 39 Idaho 382, 228 P. 1068 (1924). But S.L. 1923, ch. 211, as amended by S.L. 1925, chaps. 89 and 90, was held constitutional. In re Edwards, 45 Idaho 676, 266 P. 665 (1928).

S.L. 1923, ch. 211, as amended by S.L. 1925, chaps. 89 and 90, did not create a corporation by special act. In re Edwards, 45 Idaho 676, 266 P. 665 (1928).

S.L. 1923, ch. 211, as amended by S.L. 1925, chaps. 89 and 90, held not unconstitutional as depriving supreme court of jurisdiction. In re Edwards, 45 Idaho 676, 266 P. 665 (1928).

Good Faith.

Where defendant had not held himself out as competent or qualified to practice law having merely assisted a person in the preparation of adoption papers by typing them, using others submitted to him for style and content, but he then declined to assist such person further, and returned $10.00 paid him, after being advised that his acts might be unlawful, such acts indicated good faith on his part and further indicated an injunction against further unauthorized practice would be unnecessary. Idaho State Bar v. Meservy, 80 Idaho 504, 335 P.2d 62 (1959).

Purpose.

Primary purpose of contempt and injunction proceedings is to protect public against unskilled and unauthorized would-be practitioners. Idaho State Bar v. Meservy, 80 Idaho 504, 335 P.2d 62 (1959).

Cited in: In re Dampier, 46 Idaho 195, 267 P. 452 (1928).

3-402. Establishment of board — Members — Term of office — Election. — In order to more effectively carry out the purposes and intents of this act, there is hereby established in the department of self-governing agencies a board of commissioners of the Idaho State Bar, consisting of five (5) members to hold office for a term of three (3) years each and until their successors are elected and qualify, and to be elected in the manner hereinafter provided. There shall be one (1) member of the board of commissioners from each of the northern, eastern and western divisions of Idaho, and two (2) members of the board of commissioners from the central division. Each commissioner must be a member of the Idaho State Bar residing in or maintaining an office from which he primarily practices law in the state of Idaho, within the division from which he is selected at the time of his election and during his term of office, and shall have appointed an agent for service of process within the state of Idaho.

History.

1923, ch. 211, § 2, p. 343; am. 1925, ch. 89, § 1, p. 124; I.C.A., § 3-402; am. 1974, ch. 13, § 15, p. 138; am. 1974, ch. 42, § 1, p. 1079; am. 1985, ch. 189, § 2, p. 487.

STATUTORY NOTES

Cross References.

Department of self-governing agencies, § 67-2601 et seq.

Division of state bar, § 3-404.

Compiler's Notes.

The words "this act" refer to S.L. 1923, ch. 211, as amended by S.L. 1925, chs. 89 and 90, which is compiled as §§ 3-401 to 3-420.

Effective Dates.

Section 5 of S.L. 1974, ch. 42 declared an emergency. Approved March 4, 1974.

Section 194 of S.L. 1974, ch. 13 provided that the act be in full force and effect on and after July 1, 1974.

JUDICIAL DECISIONS

Cited in: Jackson v. Gallet, 39 Idaho 382, 228 P. 1068 (1924); In re Edwards, 45 Idaho 676, 266 P. 665 (1928); Idaho State Bar Ass'n v. Idaho Pub. Utils. Comm'n, 102 Idaho 672, 637 P.2d 1168 (1981).

3-403. Time and manner of election. — The board of commissioners shall be elected by the members of the Idaho State Bar who are eligible to vote in the election and who shall vote by ballot. The candidate from any division receiving the greatest number of votes of that division shall thereby be elected commissioner from such division. Only residents of or members of the Idaho State Bar maintaining an office in a division may vote for candidates for commissioner of that division. The ballots shall be deposited in person or by mail with the executive director of the board, or such other officer as it may designate. There shall be an annual election by the members of the Idaho State Bar eligible to vote for the purpose of electing successors to the commissioners whose terms expire. A commissioner shall be elected during 1974 and every third year thereafter from each of the northern and central divisions; during 1975 and every third year thereafter from each [of] the western and central divisions; and during 1976 and every third year thereafter from the eastern division. The board shall fix the time for holding the annual election and prescribe rules and regulations in regard thereto not in conflict with the provisions of this act. The board shall, in accordance with its rules, give at least sixty (60) days' notice by mail of the time for holding the election each year. In the event a vacancy shall occur on said board otherwise than by expiration of the term of a commissioner, such vacancy shall be filled by appointment by the remaining members of said board. Such vacancy shall be so filled from the members of the bar residing, or maintaining an office from which they primarily practice law in the state of Idaho in the division where such vacancy occurs and who have appointed an agent for service of process within the state.

History.
1923, ch. 211, § 3, p. 343; am. 1925, ch. 89, § 2, p. 124; I.C.A., § 3-403; am. 1935, ch. 8, § 1, p. 60; am. 1974, ch. 42, § 2, p. 1079; am. 1985, ch. 189, § 3, p. 487.

STATUTORY NOTES

Compiler's Notes.
The bracketed word "of" in the sixth sentence was inserted by the compiler.

For words "this act", see Compiler's Notes, § 3-402.

JUDICIAL DECISIONS

Cited in: Jackson v. Gallet, 39 Idaho 382, 228 P. 1068 (1924); In re Edwards, 45 Idaho 676, 266 P. 665 (1928); Idaho State Bar Ass'n v. Idaho Pub. Utils. Comm'n, 102 Idaho 672, 637 P.2d 1168 (1981).

3-404. Divisions of Idaho State Bar. — For the purposes of this act, the northern division of the Idaho State Bar will consist of Boundary, Bonner, Kootenai, Benewah, Shoshone, Latah, Nez Perce, Lewis, Clearwater and Idaho counties and all counties hereafter created therefrom.

The western division shall consist of Payette, Gem, Washington, Canyon, Owyhee, Twin Falls, Jerome, Lincoln, Gooding, Camas, Blaine, Cassia, Adams and Minidoka counties, and all counties hereafter created therefrom. The central division shall consist of Ada, Boise, Elmore and Valley counties and all counties hereafter created therefrom. The eastern division shall consist of Lemhi, Custer, Butte, Clark, Fremont, Jefferson, Madison, Teton, Bonneville, Bingham, Bannock, Caribou, Power, Oneida, Franklin and Bear Lake counties, and all counties hereafter created therefrom.

History.
1923, ch. 211, § 4, p. 343; am. 1925, ch. 89, § 3, p. 124; am. 1929, ch. 98, § 1, p. 159; I.C.A., § 3-404; am. 1974, ch. 42, § 3, p. 1079.

STATUTORY NOTES

Compiler's Notes.
For words "this act", see Compiler's Notes, § 3-402.

Effective Dates.
Section 5 of S.L. 1974, ch. 42 declared an emergency. Approved March 4, 1974.

JUDICIAL DECISIONS

Cited in: Jackson v. Gallet, 39 Idaho 382, 228 P. 1068 (1924); In re Edwards, 45 Idaho 676, 266 P. 665 (1928); Idaho State Bar Ass'n v. Idaho Pub. Utils. Comm'n, 102 Idaho 672, 637 P.2d 1168 (1981).

3-405. Member of the Idaho state bar defined. — All persons who have been heretofore, or shall hereafter be, duly admitted to practice law before the supreme court of this state, and who have not been disbarred or suspended therefrom, and who shall have paid the license fee in this chapter provided for, and all attorney magistrates, judges of the district court and court of appeals, and supreme court justices of this state, and of the district court of the United States for Idaho, are hereby declared to be members of the Idaho state bar.

History.
1923, ch. 211, § 4A, as added by 1925, ch. 89, § 8, p. 124; I.C.A., § 3-405; am. 2010, ch. 27, § 1, p. 47.

STATUTORY NOTES

Cross References.
License fee, § 3-409.

Amendments.
The 2010 amendment, by ch. 27, near the middle, substituted "this chapter" for "this Act" and inserted "attorney magistrates" and "court and court of appeals" and "justices."

JUDICIAL DECISIONS

Cited in: Idaho State Bar Ass'n v. Idaho Pub. Utils. Comm'n, 102 Idaho 672, 637 P.2d 1168 (1981).

3-406. Nominations to office of commissioner. — Nomination to the office of commissioner shall be by the written petition of not less than five (5) or more than ten (10) members of the Idaho State Bar in good standing. Any number of candidates may be nominated on a single petition. Such nomi-

nating petition shall be mailed to the executive director within a period to be fixed by the rules made by the board of commissioners. Attorneys residing, or maintaining an office from which they primarily practice law in the state of Idaho and who have appointed an agent for service of process within the state of Idaho, in one division shall alone have the right to nominate persons for the office of commissioner from that division.

History.
1923, ch. 211, § 7, p. 343; 1925, ch. 89, § 4, p. 124; I.C.A., § 3-407; am. 1963, ch. 33, § 1, p. 176; am. 1985, ch. 189, § 4, p. 487.

STATUTORY NOTES

Compiler's Notes.
This section as enacted in 1923 contained a third sentence which was omitted as temporary and which read, "For the purposes of the first election the petitions shall be sent through the mails to the above provided election and canvassing board."

Effective Dates.
Section 2 of S.L. 1963, ch. 333 declared an emergency. Approved February 20, 1963.

3-407. Organization of the board. — On the fourth Tuesday following the certification of their names the first commissioners shall meet at the office of the clerk of the Supreme Court and organize by the election of the following officers of the Idaho State Bar and its board of commissioners, namely: a president, a vice-president and a secretary. The commissioners first elected shall hold office for one (1), two (2) and three (3) years respectively and at the first meeting their terms shall be determined by lot. Their successors shall hold office for three (3) years and until the appointment of successors. After each appointment the board shall again select officers. The secretary and such other assistants as the board may require may be selected either from within or without the board, and shall be paid such compensation as the board shall determine.

History.
1923, ch. 211, § 7, p. 343; 1925, ch. 89, § 4, p. 124; I.C.A., § 3-407.

JUDICIAL DECISIONS

Constitutionality.
S.L. 1923, ch. 211 (§§ 3-401 — 3-420), as amended by S.L. 1925, chaps. 89 and 90, did not create a corporation by special act. In re Edwards, 45 Idaho 676, 266 P. 665 (1928). See Jackson v. Gallet, 39 Idaho 382, 228 P. 1068 (1924).

3-408. Admission to practice and disbarment proceedings — Rules and bylaws — Power of board to adopt — Supervisory power of supreme court. — The board of commissioners shall have power to determine, by rules, subject to the approval of the supreme court, the qualifications and requirements for admission to the practice of the law and to conduct investigation and examination of applicants, and it shall from time to time certify to the supreme court the names of those applicants found to be qualified. The investigation shall include a fingerprint-based criminal history check of the Idaho central criminal history database and

the federal bureau of investigation criminal history database. Each person listed as an applicant on an initial application shall submit a full set of fingerprints with the application. The approval by the supreme court of the applicants whose names are so certified, shall entitle them to enrollment, as members of the bar of this state, and to practice law upon their paying the required fees and taking the oath. The board shall formulate rules governing the conduct of all persons admitted to practice and shall investigate and pass upon all complaints that may be made concerning the professional conduct of any person admitted to the practice of the law. In all cases in which the investigation, in the opinion of a majority of the board, justifies such a course, it shall recommend to the supreme court such disciplinary action by public or private reprimand, suspension from the practice of the law, or exclusion and disbarment therefrom, as the case shall in its judgment warrant. Upon the making of any recommendation by the board reprimanding, suspending or excluding or disbarring any member of the Idaho state bar from the practice of the law, the board shall cause the record of proceedings in said matter or a copy thereof certified by its secretary or president to be filed with the clerk of the supreme court. The supreme court shall thereupon enter such judgment in said matter as it deems proper. The board of commissioners shall also have power to make rules and bylaws, subject to the approval of the supreme court, not in conflict with any of the terms of this act concerning the selection and tenure of its officers and committees and their powers and duties, and generally for the control and regulation of the business of the board and of the Idaho state bar.

The board of commissioners shall also have power after proceedings as in other cases of discipline to recommend to the supreme court the discipline of its officers and the members of its committees in the event of refusal, neglect, failure or corrupt or wrongful performance of their respective duties.

History.

1923, ch. 211, § 8, p. 343; am. 1929, ch. 98, § 2, p. 159; I.C.A., § 3-408; am. 2002, ch. 297, § 1, p. 852.

STATUTORY NOTES

Cross References.

Admission to practice, § 3-101 et seq.

Change or withdrawal of attorney, Idaho Civil Procedure Rules 11(b)(1) to 11(b)(4).

Rights and duties of attorneys, § 3-201 et seq.

Compiler's Notes.

The Idaho central criminal history database, referred to in the second sentence, is the state's central repository of criminal history, maintained by the Idaho state police, bureau of criminal identification.

See *http://www.isp.state.id.us/identification/crime_history*.

The federal bureau of investigation criminal history database, referred to in the second sentence, is the integrated automated fingerprint identification system (IAFIS), maintained by the criminal justice information services division of the federal bureau of investigation. See *http://www.fbi.gov/hq/cjisd/iafis.htm*.

The words "this act", near the end of the first paragraph, refer to S.L. 1923, ch. 211, as amended by S.L. 1925, chs. 89 and 90, which is compiled as §§ 3-401 to 3-420.

JUDICIAL DECISIONS

ANALYSIS

Cause for disbarment.
Constitutionality.
Due process.
Findings of fact and conclusions of law.
Length of suspension.
Powers of supreme court and board.
Purpose of statute.

Cause for Disbarment.

Commission has no power to make and enter a judgment of disbarment for matters wholly outside of and in no way connected with the practice of law. In re Dampier, 46 Idaho 195, 267 P. 452 (1928).

Constitutionality.

This section, prior to its amendment in 1929, was held unconstitutional, in part, as an attempt to clothe the board with judicial powers. In re Edwards, 45 Idaho 676, 266 P. 665 (1928).

Rules authorizing the board to act merely in an administrative capacity and as an arm of the supreme court, with the power to make investigations and return to the supreme court its findings and conclusions thereon, are not unconstitutional. In re Edwards, 45 Idaho 676, 266 P. 665 (1928).

Due Process.

The failure of the Idaho bar commission to make findings of fact deprived a bar applicant of his right to due process of law. His interest in practicing law in Idaho was a substantial interest. The administrative cost of making findings of fact would be minimal. There would be no ancillary disruptive effect on the administrative efficiency of the commission. Dexter v. Idaho State Bd. of Comm'rs, 116 Idaho 790, 780 P.2d 112 (1989).

Findings of Fact and Conclusions of Law.

Even though Idaho bar commission rules merely require that the commission "enter its decision affirming or reversing its previous action within 14 days," the commissioners have a duty to formulate findings of fact and conclusions of law so that a reviewing court may have a basis to conduct meaningful review. Dexter v. Idaho State Bd. of Comm'rs, 116 Idaho 790, 780 P.2d 112 (1989).

Length of Suspension.

Transcript and record showed that three months' suspension was insufficient and petitioner should be suspended for a year. In re Burns, 55 Idaho 190, 40 P.2d 105 (1935).

Powers of Supreme Court and Board.

Supreme court has inherent power over admission to practice law, discipline of persons admitted, and disbarment. In re Edwards, 45 Idaho 676, 266 P. 665 (1928).

S.L. 1923, ch. 211 (§§ 3-401 to 3-420), as amended by S.L. 1925, chaps. 89 and 90, did not delegate any legislative powers to, or confer any judicial powers upon, the board. In re Edwards, 45 Idaho 676, 266 P. 665 (1928).

Purpose of Statute.

The purpose of suspension and disbarment proceedings is not to punish, but to protect the public from those who are found unfit to perform the duties of an attorney at law. In re Carter, 59 Idaho 547, 86 P.2d 162 (1938).

Cited in: Freeling v. Tucker, 49 Idaho 475, 289 P. 85 (1930); Decision of Prof. Conduct Bd. v. State Bar, 135 Idaho 823, 25 P.3d 846 (2001).

3-409. License fees and appropriations. [Effective until November 1, 2010.] — Every person practicing, or holding himself out as practicing law within this state, or holding himself out to the public as a person qualified to practice or carry on the calling of a lawyer within this state, except state and United States judges of the courts of record within this state, shall, prior to so doing and no later than February 1 of each year pay to the board of commissioners of the Idaho state bar as a license fee the following amounts:

For the calendar year of admission to the practice of law in the state of Idaho if admitted prior to July 1: one hundred forty dollars ($140); For the calendar year of admission to the practice of law in the state of Idaho if admitted after July 1: ninety dollars ($90.00); Each year for the next three

(3) calendar years following the calendar year of admission: two hundred fifty-five dollars ($255); Each year after the third full year of admission: three hundred forty dollars ($340); Each year following the calendar year of the lawyer's seventy-second birthday: fifty-five dollars ($55.00); Affiliate members for each calendar year: one hundred twenty dollars ($120).

The moneys thus collected, together with other revenues shall be administered under the direction of the board of commissioners of the Idaho state bar for the purpose of administering the Idaho state bar, encouraging local bar associations, promoting legal education seminars, fostering relations between the public and the bar and for the purpose of establishing and maintaining a clients' assistance fund which shall be administered by the Idaho state bar commissioners under rules approved by the supreme court, provided that the clients' assistance fund shall be funded by assessment of the members of the Idaho state bar not to exceed twenty dollars ($20.00) per member per year, independent of the license fee. All moneys received and expended by the commissioners of the Idaho state bar shall be audited annually by a certified public accountant.

History.

1923, ch. 211, § 9, as added by 1925, ch. 90, § 1, p. 128; I.C.A., § 3-409; am. 1939, ch. 48, § 1, p. 89; am. 1945, ch. 50, § 1, p. 65; am. 1951, ch. 59, § 1, p. 87; am. 1955, ch. 48, p. 65; am. 1963, ch. 47, § 1, p. 198; am. 1969, ch. 245, § 1, p. 770; am. 1970, ch. 117, § 1, p. 279; am. 1975, ch. 257, § 1, p. 702; am. 1976, ch. 143, § 1, p. 528; am. 1981, ch. 232, § 1, p. 471; am. 1985, ch. 190, § 1, p. 489; am. 1989, ch. 78, § 1, p. 139; am. 1998, ch. 66, § 1, p. 259; am. 2002, ch. 138, § 1, p. 390; am. 2003, ch. 118, § 1, p. 361.

STATUTORY NOTES

Compiler's Notes.

For this section as effective November 1, 2010, see the following section, also numbered § 3-409.

Effective Dates.

Section 2 of S.L. 1955, ch. 48 declared an emergency. Approved February 19, 1955.

Section 2 of S.L. 1963, ch. 47 declared an emergency. Approved March 1, 1963.

Section 2 of S.L. 1981, ch. 232 provided that the act should take effect on and after January 1, 1982.

JUDICIAL DECISIONS

Analysis

Attorney from another state.
Constitutionality.
Evidentiary standard in client's security fund actions.

Attorney from Another State.

An attorney from another state held entitled to recover for services rendered in a probate court of Idaho, although he had not been admitted to practice in Idaho. Freeling v. Tucker, 49 Idaho 475, 289 P. 85 (1930).

Constitutionality.

S.L. 1923, ch. 211 (§§ 3-401 to 3-420), as amended by S.L. 1925, chaps. 89 and 90, held not unconstitutional as an appropriation of private funds for a private use. In re Edwards, 45 Idaho 676, 266 P. 665 (1928). See Jackson v. Gallet, 39 Idaho 382, 228 P. 1068 (1924).

Evidentiary Standard in Client's Security Fund Actions.

Instead of the clear and convincing evidence standard historically required in attorney disbarment and disciplinary actions, a preponderance of the evidence standard is applied in client's security fund actions. Williams v. Idaho State Bar, 123 Idaho 367, 848 P.2d 425 (1993). See also Idaho State Bar v. Williams, 126 Idaho 839, 893 P.2d 202 (1995).

Cited in: In re Williams, 158 Bankr. 488 (Bankr. D. Idaho 1993).

3-409. License fees and appropriations. [Effective November 1, 2010.] — (1) Every person practicing, or holding himself out as practicing law within this state, or holding himself out to the public as a person qualified to practice or carry on the calling of a lawyer within this state, except state and United States judges of the courts of record within this state, shall, prior to so doing and no later than February 1 of each year pay to the board of commissioners of the Idaho state bar a license fee as provided in this section.

(2) For the year 2011, license fees shall be in the following amounts:

(a) Active members and house counsel:

(i) For the calendar year of admission to the practice of law in the state of Idaho if admitted prior to July 1: one hundred fifty-five dollars ($155);

(ii) For the calendar year of admission to the practice of law in the state of Idaho if admitted after July 1: one hundred dollars ($100);

(iii) Each year for the next three (3) calendar years following the calendar year of admission: two hundred eighty-five dollars ($285);

(iv) Each year after the third full year of admission: three hundred eighty dollars ($380);

(v) Each year following the calendar year of the lawyer's seventy-second birthday: sixty dollars ($60.00).

(b) Affiliate and emeritus members:

(i) For each calendar year: one hundred thirty-five dollars ($135);

(ii) Each year following the calendar year of the lawyer's seventy-second birthday: sixty dollars ($60.00).

(3) For the year 2012 and each year thereafter, license fees shall be in the following amounts:

(a) Active members and house counsel:

(i) For the calendar year of admission to the practice of law in the state of Idaho if admitted prior to July 1: one hundred seventy-five dollars ($175);

(ii) For the calendar year of admission to the practice of law in the state of Idaho if admitted after July 1: one hundred fifteen dollars ($115);

(iii) Each year for the next three (3) calendar years following the calendar year of admission: three hundred twenty dollars ($320);

(iv) Each year after the third full year of admission: four hundred twenty-five dollars ($425);

(v) Each year following the calendar year of the lawyer's seventy-second birthday: seventy dollars ($70.00).

(b) Affiliate and emeritus members:

(i) For each calendar year: one hundred fifty dollars ($150);

(ii) Each year following the calendar year of the lawyer's seventy-second birthday: seventy dollars ($70.00).

(4) The moneys thus collected, together with other revenues shall be administered under the direction of the board of commissioners of the Idaho state bar for the purpose of administering the Idaho state bar, encouraging

local bar associations, promoting legal education seminars, fostering relations between the public and the bar and for the purpose of establishing and maintaining a clients' assistance fund which shall be administered by the Idaho state bar commissioners under rules approved by the supreme court, provided that the clients' assistance fund shall be funded by assessment of the members of the Idaho state bar not to exceed twenty dollars ($20.00) per member per year, independent of the license fee. All moneys received and expended by the commissioners of the Idaho state bar shall be audited annually by a certified public accountant.

History.

1923, ch. 211, § 9, as added by 1925, ch. 90, § 1, p. 128; I.C.A., § 3-409; am. 1939, ch. 48, § 1, p. 89; am. 1945, ch. 50, § 1, p. 65; am. 1951, ch. 59, § 1, p. 87; am. 1955, ch. 48, p. 65; am. 1963, ch. 47, § 1, p. 198; am. 1969, ch. 245, § 1, p. 770; am. 1970, ch. 117, § 1, p. 279; am. 1975, ch. 257, § 1, p. 702; am. 1976, ch. 143, § 1, p. 528; am. 1981, ch. 232, § 1, p. 471; am. 1985, ch. 190, § 1, p. 489; am. 1989, ch. 78, § 1, p. 139; am. 1998, ch. 66, § 1, p. 259; am. 2002, ch. 138, § 1, p. 390; am. 2003, ch. 118, § 1, p. 361; am. 2010, ch. 40, § 1, p. 70.

STATUTORY NOTES

Amendments.

The 2010 amendment, by ch. 40, added the subsection and paragraph designations, subdivided present subsection (2), increasing the fees therein, and added present subsection (3).

Compiler's Notes.

For this section as effective until November 1, 2010, see the preceding section, also numbered § 3-409.

Effective Dates.

Section 2 of S.L. 2010, ch. 40 provided that the act should take effect on and after November 1, 2010.

3-410. Receipts and license — Issuance. — The secretary of the board shall issue a receipt to each person paying said license fee and shall, if such person shall have theretofore been admitted to practice law in this state by the Supreme Court and not disbarred or then under suspension, thereupon issue to such person a license in such form as the board shall prescribe, for the year for which license fees were paid.

History.

1923, ch. 211, § 9A, as added by 1925, ch. 90, § 2, p. 128; I.C.A., § 3-410; am. 1970, ch. 117, § 2, p. 279.

JUDICIAL DECISIONS

Cited in: In re Edwards, 45 Idaho 676, 266 P. 665 (1928).

3-411. Disbursements — Power of board — Compensation and expenses. — For the purpose of carrying out the objects of this chapter, and in the exercise of the powers therein granted and duties hereby imposed, the board shall have power to make orders concerning disbursements; no member of the board shall receive any compensation for his services as such member but members of the board, and persons acting under the direction of said board shall be paid their actual necessary expenses, approved by said board, connected with the performance of the objects, powers or duties provided by this chapter. This act is expressly exempted from the provisions

of sections 67-2007 and 67-2008[,] Idaho Code (Standard Travel Pay and Allowance Act of 1949).

History.
1923, ch. 211, § 10, p. 343; I.C.A., § 3-411; am. 1939, ch. 48, § 2, p. 89; am. 1951, ch. 59, § 2, p. 87; am. 1970, ch. 117, § 3, p. 279.

STATUTORY NOTES

Compiler's Notes.
The term "this act", in the last sentence, refers to S.L. 1951, ch. 59, which is codified as §§ 3-409 and 3-411.

The bracketed insertion in the last paragraph was added by the compiler to conform to the statutory citation style.

Effective Dates.
Section 3 of S.L. 1951, ch. 59 declared an emergency. Approved February 24, 1951.

JUDICIAL DECISIONS

Cited in: Jackson v. Gallet, 39 Idaho 382, 228 P. 1068 (1924); In re Edwards, 45 Idaho 676, 266 P. 665 (1928).

3-412. Disciplinary procedure — Adoption of rules — Supervisory power of Supreme Court. — The board of commissioners shall establish rules, subject to the approval of the Supreme Court, governing procedure in cases and investigations involving alleged misconduct of members of the Idaho State Bar, and to make and create committees for the purpose of investigating complaints and charges, which committees may be empowered to recommend to the board discipline, including reprimand, suspension or disbarment from the practice of law, in the same manner as the board itself, and the board shall thereafter consider the action of the committee and make its recommendation to the Supreme Court. The board or any such committee may designate any officer authorized by law to take depositions, to take testimony under oath in any such proceedings or investigations.

History.
1923, ch. 211, § 11, p. 343; am. 1929, ch. 98, § 3, p. 159; I.C.A., § 3-412.

STATUTORY NOTES

Cross References.
Disbarment, § 3-301 et seq.

JUDICIAL DECISIONS

ANALYSIS

Constitutionality.
Powers of committee.

Constitutionality.
This section, as enacted in 1923, held valid only in so far as it authorized the board to appoint committees to investigate charges

and report their findings. In re Edwards, 45 Idaho 676, 266 P. 665 (1928) (but see 1929 amendment).

Powers of Committee.

A committee appointed for the purpose of investigating complaints and charges would clearly be without power to administer discipline, including suspension and disbarment, such power being judicial and not administrative. In re Edwards, 45 Idaho 676, 266 P. 665 (1928) (but see 1929 amendment).

Cited in: In re Carter, 59 Idaho 547, 86 P.2d 162 (1938); In re Mills, 71 Idaho 128, 227 P.2d 81 (1951).

RESEARCH REFERENCES

Am. Jur. — 7 Am. Jur. 2d, Attorneys-at-Law, § 29 et seq.

C.J.S. — 7A C.J.S., Attorney and Client, § 61 et seq.

3-413. Approval of rules by Supreme Court required. — The rules and regulations made by the board shall, before becoming effective, be submitted to and approved by the Supreme Court of the state of Idaho.

History.

1923, ch. 211, § 12, p. 343; am. 1925, ch. 89, § 7, p. 124; I.C.A., § 3-413.

JUDICIAL DECISIONS

Cited in: In re Edwards, 45 Idaho 676, 266 P. 665 (1928).

3-414. Power of subpoena. — In the investigation of charges of professional misconduct the board, and any committee appointed by it for this purpose, shall have the power to summon and examine witnesses under oath and compel their attendance and the production of books, papers, documents and other writings necessary or material to the inquiry. Such summons or subpoena shall be issued under the hand of the secretary of the board, or any member of the board, or any member of a committee appointed by the board to conduct such investigation or hearing, and shall have the force and effect of a subpoena issued by a court of competent jurisdiction, and any witness or other person who shall refuse or neglect to appear in obedience thereto or who shall refuse to be sworn or testify or produce books, papers, documents or other writings demanded, shall be liable to attachment upon application to the Supreme Court of the state or to any judge of any court of record for the district where the investigation is conducted, as in cases of contempt.

History.

1923, ch. 211, § 13, p. 343; I.C.A., § 3-414.

STATUTORY NOTES

Cross References.

Contempt proceedings, § 7-601 et seq.

Subpoenas, Idaho Civil Procedure Rules 45(a) to 45(d)(2).

3-415. Rights of accused member. — Any member of the Idaho State Bar complained of shall have notice and opportunity to defend by the introduction of evidence and the examination of witnesses called against

him, and the right to be represented by counsel. He shall also have the right to summon witnesses to appear and testify or produce books, papers, documents or other writings necessary or material to his defense in like manner as provided in section 3-414[, Idaho Code]. In case of suspension or disbarment from practice the accused shall have the right to have the order of the board reviewed by the Supreme Court.

History.
1923, ch. 211, § 14, p. 343; I.C.A., § 3-415.

STATUTORY NOTES

Compiler's Notes.
The bracketed insertion, at the end of the second sentence, was added by the compiler to conform to the statutory citation style.

JUDICIAL DECISIONS

Trial Based on Charges.
Trial of an attorney in disbarment proceedings can be had only on charges contained in the information or rule. In re Edwards, 45 Idaho 676, 266 P. 665 (1928).

RESEARCH REFERENCES

A.L.R. — Extent and determination of attorney's right or privilege against self-incrimination in disbarment or other disbarment or other disciplinary proceedings — Post-Spevack cases. 30 A.L.R.4th 243.

3-416. Record of proceedings. — A complete record of the proceedings and evidence taken by the board, committee or commissioner shall be made and preserved by the board.

History.
1923, ch. 211, § 15, p. 343; I.C.A., § 3-416.

JUDICIAL DECISIONS

Record of Suspension Proceeding.
Member of bar suspended for one year was not entitled to have the record supplied with a copy of testimony taken by special investigating committee, where it is not shown that the trial committee considered such testimony. In re Edwards, 44 Idaho 163, 255 P. 906 (1927).

3-417. Annual meeting of the bar — Election — Special meetings — Notice of meetings. — There shall be an annual meeting of the Idaho State Bar presided over by the president of the board, and open to all members of the Idaho State Bar in good standing, and held at such time and place as the board of commissioners may designate, for the discussion of the affairs of the bar and the administration of justice. At noon on the first day of such meeting, the annual election shall close and the ballots be canvassed and the result announced. The commissioners thereby appointed shall take office immediately. Special meetings of the Idaho State Bar may be held at such times and places as the board of commissioners may designate. Notice of all meetings shall be given by mail to all members of the Idaho State Bar not less than fifteen days prior to the date of said meeting.

History.
1923, ch. 211, § 16, p. 343; am. 1925, ch. 89, § 5, p. 124; I.C.A., § 3-417; am. 1935, ch. 27, § 1, p. 43.

JUDICIAL DECISIONS

Cited in: Jackson v. Gallet, 39 Idaho 382, 228 P. 1068 (1924); In re Edwards, 45 Idaho 676, 266 P. 665 (1928).

3-418. Administration of justice — Investigations, study and recommendations of board. — The governor, Supreme Court, or the legislature of the state of Idaho, may request of the board an investigation and study of and recommendations upon any matter relating to the courts of this state, practice and procedure therein, practice of the law, and the administration of justice in Idaho, and thereupon it shall be the duty of said board to cause such investigation and study to be made, reported to an annual meeting of the Idaho State Bar, and, after the action of said meeting thereon, to report the same to the officer or body making the request. The board may, without such request, cause an investigation and study upon the same subject-matters, and after a report thereon to an annual meeting of the Idaho State Bar, report the same and the action of said meeting thereon to the governor, Supreme Court, or the legislature of the state of Idaho.

History.
1923, ch. 211, § 16A, as added by 1929, ch. 98, § 4, p. 159; I.C.A., § 3-418.

3-419. Advancement of jurisprudence — Improvement of administration of justice. — The Idaho State Bar and its board of commissioners shall have the power and authority to aid in the advancement of the science of jurisprudence and in the improvement of the administration of justice.

History.
1923, ch. 211, § 16B, as added by 1929, ch. 98, § 5, p. 159; I.C.A., § 3-419.

3-420. Unlawful practice of law — Penalty. — If any person shall, without having become duly admitted and licensed to practice law within this state or whose right or license to practice therein shall have terminated either by disbarment, suspension, failure to pay his license or otherwise, practice or assume to act or hold himself out to the public as a person qualified to practice or carry on the calling of a lawyer within this state, he shall be guilty of an offense under this act, and on conviction thereof be fined not to exceed five hundred dollars ($500), or be imprisoned for a period of not to exceed six (6) months, or both, and if he shall have been admitted to practice law he shall in addition be subject to suspension under the proceedings provided by this act.

History.
1923, ch. 211, § 17, p. 343; am. 1925, ch. 89, § 6, p. 124; I.C.A., § 3-420.

STATUTORY NOTES

Cross References.
Practicing without license a contempt, § 3-104.

Compiler's Notes.
The words "this act" refer to S.L. 1923, ch. 211, as amended by S.L. 1925, chs. 89 and 90, which is compiled as §§ 3-401 to 3-420.

JUDICIAL DECISIONS

Analysis

Attorney from another state.
Constitutionality.
Filing of papers by suspended attorney.
Illegal practice of law.
Software program.
Sufficiency of charge.

Attorney from Another State.
An attorney from another state was entitled to recover for service rendered in a probate court of Idaho, although he had not been admitted to practice in Idaho. Freeling v. Tucker, 49 Idaho 475, 289 P. 85 (1930).

Constitutionality.
This section, proscribing the unauthorized practice of law, did not suffer constitutional infirmity due to either overbreadth or vagueness, because its ban plainly encompassed a wide range of constitutionally proscribed conduct and the alleged behavior for which defendant was being prosecuted clearly fell within the core of conduct that was prohibited by the statute. State v. Wees, 138 Idaho 119, 58 P.3d 103 (Ct. App. 2002).

Filing of Papers by Suspended Attorney.
Where an attorney, who had been suspended from the practice of law, filed complaints and other papers which gave the false impression that he was a practicing attorney, his actions constituted unlawful practice of the law. In re Depew, 98 Idaho 215, 560 P.2d 886 (1977).

Illegal Practice of Law.
Where a trust company holds itself out as qualified to draft wills and trust declarations, it is guilty of illegally holding itself out as qualified to practice law. In re Eastern Idaho Loan & Trust Co., 49 Idaho 280, 288 P. 157 (1930).

The practice of law as generally understood is the doing or performing services in a court of justice, in any matter depending therein, throughout its various stages, and in conformity with the adopted rules of procedure; but in a larger sense, it includes legal advice and counsel, and the preparation of instruments and contracts by which legal rights are secured, although such matter may or may not be pending in a court. In re Matthews, 58 Idaho 772, 79 P.2d 535 (1938).

Notary public who advertises to draw correct legal conveyances in connection with his abstract business and who in doing so merely fills blank spaces in legal forms does not hold himself out as qualified to practice in violation of this section. In re Matthews, 58 Idaho 772, 79 P.2d 535 (1938).

When a credit cardholder's husband, who was not a licensed attorney, represented the cardholder in a dispute with a bank, the husband engaged in the unauthorized practice of law. Citibank (South Dakota), N.A. v. Carroll, — Idaho —, 220 P.3d 1073 (2009).

Software Program.
Advising a debtor filing for bankruptcy of available exemptions from which to choose, or actually choosing an exemption for the debtor with no explanation, requires the exercise of legal judgment beyond the capacity and knowledge of lay persons, and plugging in solicited information from questionnaires and personal interviews to a pre-packaged bankruptcy software program constitutes the unauthorized practice of law. In re Farness, 244 Bankr. 464 (Bankr. D. Idaho 1999).

Sufficiency of Charge.
Allegation that accused had illegally practiced law is insufficient if made on information and belief. In re Eastern Idaho Loan & Trust Co., 49 Idaho 280, 288 P. 157 (1930).

Cited in: In re Edwards, 45 Idaho 676, 266 P. 665 (1928); Freeling v. Tucker, 49 Idaho 475, 289 P. 85 (1930); Idaho State Bar Ass'n v. Idaho Pub. Utils. Comm'n, 102 Idaho 672, 637 P.2d 1168 (1981).

RESEARCH REFERENCES

Am. Jur. — 7 Am. Jur. 2d, Attorneys-at-Law, § 70 et seq.

C.J.S. — 7 C.J.S., Attorney and Client, § 26 et seq.

A.L.R. — Handling, preparing, presenting or trying workmen's compensation claims or cases as practice of law. 2 A.L.R.3d 724.

Maintenance of lawyer reference system by organization having no legal interest in proceedings. 11 A.L.R.3d 1206.

Representation of another before state public utilities service commission as involving practice of law. 13 A.L.R.3d 812.

Activities of law clerks as illegal practice of law. 13 A.L.R.3d 1137.

Drafting of will or other estate-planning activities as illegal practice of law. 22 A.L.R.3d 1112.

Operations of collection agency as unauthorized practice of law. 27 A.L.R.3d 1152.

What activities of stock or security broker constitute unauthorized practice of law. 34 A.L.R.3d 1305.

Sale of books or forms designed to enable layman to achieve legal results without assistance of attorney as unauthorized practice of law. 71 A.L.R.3d 1000.

Liability of professional corporation of lawyers, or individual members thereof, for malpractice or other tort of another member. 39 A.L.R.4th 556.

What constitutes "unauthorized practice of law" by out-of-state counsel? 83 A.L.R.5th 497.

Unauthorized practice of law — Real estate closings. 119 A.L.R.5th 191.

TITLE 4

LAW LIBRARIES

CHAPTER.
1. State Law Libraries, §§ 4-101 — 4-108.

CHAPTER 1

STATE LAW LIBRARIES

SECTION.
4-101. Establishment of a state law library.
4-102. State publication furnished law library.
4-103. Control of the state law library.
4-104. [Repealed.]
4-105. Disbursement of funds.
4-106. [Repealed.]
4-107. Use and abuse of law library.
4-108. [Repealed.]

4-101. Establishment of a state law library. — A state law library for the use of the courts and members of the bar of this state is hereby established in the city of Boise. The Boise state law library is hereby also designated as the state depository for official publications received from other states and the federal government.

History.
1925, ch. 86, § 1, p. 120; I.C.A., § 4-101; am. 1951, ch. 87, § 1, p. 157; am. 1959, ch. 73, § 3, p. 165; am. 1969, ch. 212, § 1, p. 614; am. 2008, ch. 25, § 1, p. 38.

STATUTORY NOTES

Cross References.
Public libraries, § 33-2601 et seq.
Commission for libraries, § 33-2501 et seq.
County law library, county commissioners may maintain, § 31-825.
Regional library systems, § 33-2612 et seq.

Amendments.
The 2008 amendment, by ch. 25, deleted "shall be kept in the state capitol building of the Supreme Court and law library building" following "law library" in the last sentence.

Effective Dates.
Section 2 of S.L. 2008, ch. 25 declared an emergency. Approved February 21, 2008.

4-102. State publication furnished law library. — A copy of each law, pamphlet or other publication hereafter made by or under authority of the state, or any of its agencies, shall be sent to the state law library.

History.
1925, ch. 86, § 2, p. 120; I.C.A., § 4-102; am. 1951, ch. 87, § 2, p. 157.

4-103. Control of the state law library. — The justices of the Supreme Court shall have the control and management of the state law library and shall make such rules and regulations respecting the same as they may deem best. They shall appoint librarians therefor and fix their compensation and the amount of bond required in case they deem bond

should be given. Said justices may dispose of superfluous or duplicate publications or other property of said law library, by sale or otherwise as they may deem to be in the public interest. Any moneys so received shall be paid to the state treasurer and apportioned to the general fund.

History.
1925, ch. 86, § 3, p. 120; I.C.A., § 4-103; am. 1951, ch. 87, § 3, p. 157.

4-104. State law library fund. [Repealed.]

STATUTORY NOTES

Compiler's Notes.
This section, which comprised 1925, ch. 86, § 4, p. 120; am. 1927, ch. 187, § 1; I.C.A., § 4-104, was repealed by S.L. 1949, ch. 283, § 1.

4-105. Disbursement of funds. — The justices of the Supreme Court shall have the management of all funds belonging to or appropriated for the use of the state law library, and expend and disburse the same for the benefit thereof, as, in their judgment may be best; and upon demand of said justices or any three (3) of them, the state controller shall draw his warrants upon the state treasurer to the extent of such sums as there may be in the treasurer's hands belonging to or appropriated for the use of said state law library.

History.
1925, ch. 86, § 5, p. 120; am. 1927, ch. 187, § 2, p. 250; I.C.A., § 4-105; am. 1951, ch. 87, § 4, p. 157; am. 1994, ch. 180, § 7, p. 420.

STATUTORY NOTES

Effective Dates.
Section 241 of S.L. 1994, ch. 180 provided that such act should become effective on and after the first Monday in January, 1995 [January 2, 1995] if the amendment to the Constitution of Idaho changing the name of the state auditor to state controller [1994 S.J.R. No. 109, p. 1493] was adopted at the general election held on November 8, 1994. Since such amendment was adopted, the amendment to this section by § 7 of S.L. 1994, ch. 180 became effective January 2, 1995.

4-106. Appropriation of funds. [Repealed.]

STATUTORY NOTES

Compiler's Notes.
This section, which comprised 1925, ch. 86, § 6, p. 120; am. 1927, ch. 187, § 3; I.C.A., § 4-106, was repealed by S.L. 1949, ch. 283, § 4.

4-107. Use and abuse of law library. — Any person may have access to and may use the books in the state law library under such restrictions as the justices of the Supreme Court may prescribe. Any person who shall violate any rule established for the management of the state law library may be denied the privileges thereof. Any person who shall wantonly mutilate or destroy any book or article of furniture, or any pamphlet or paper belonging to the state law library, shall be deemed guilty of a misdemeanor and shall

be punished accordingly. Any person who fails to return to the state law library any book taken therefrom by him, within the time prescribed by the rules of said library, shall be liable to the librarian in three (3) times its value to be recovered in a civil action; and if such person be an officer or employee of the state, the same shall be withheld from his salary.

History.
1925, ch. 86, § 7, p. 120; I.C.A., § 4-107; am. 1951, ch. 87, § 5, p. 157.

STATUTORY NOTES

Cross References.
Penalty for misdemeanor where none prescribed, § 18-113.

Compiler's Notes.
Section 6 of S.L. 1951, ch. 87, read: "The law libraries presently established at Lewiston and Pocatello are hereby abolished and the justices of the supreme court are hereby authorized and directed to donate and transfer without delay the books, bookcases, shelving and personal property in the law library at Lewiston to the county of Nez Perce, state of Idaho, for the use and benefit of said county, the courts, and the practicing attorneys; said library when so transferred to be maintained by said county at no expense to the state of Idaho. The justices of the supreme court are also authorized and directed to donate and transfer without delay the books, bookcases, shelving and personal property in the law library at Pocatello, county of Bannock, state of Idaho, for the use of and benefit of said county, the courts and the practicing attorneys; said library to be maintained by said county at no cost or expense to the state of Idaho."

Section 7 of S.L. 1951, ch. 87, read: "Upon effecting the donation and transfer of the books, bookcases, shelving and personal property as hereinabove provided by section 6 of this act, the court shall notify the governor of the state of Idaho. Thereafter the governor is authorized and directed by proper conveyance to donate to the county of Nez Perce, on behalf of the state of Idaho, the building and the real property upon which it is situated in the city of Lewiston, county of Nez Perce, state of Idaho, more particularly described as follows, to-wit: A lot in the southwest corner of lot three (3) of acres as shown upon the plot of True's survey of said city, in the recorder's office of said county, ninety (90) feet wide and one hundred and fifty (150) feet long. The lot to be conveyed fronting west on the east side of Fifth street ninety (90) feet and south on the north side of G street one hundred and fifty (150) feet. Upon effecting the conveyance to the county of Nez Perce, the state of Idaho shall be put to no further cost or expense for the operation, maintenance or use of said building and real property."

Effective Dates.
Section 8 of S.L. 1951, ch. 87 provided such act should be in full force and effect on and after July 1, 1951.

4-108. Names of new attorneys reported to state treasurer. [Repealed.]

STATUTORY NOTES

Compiler's Notes.
This section, which comprised 1925, ch. 86, § 8, p. 120; I.C.A., § 4-108, was repealed by S.L. 1949, ch. 283, § 5.

TITLE 5

PROCEEDINGS IN CIVIL ACTIONS IN COURTS OF RECORD

CHAPTER 1

FORM OF ACTIONS

5-101 — 5-103. Forms of actions. [Repealed.]

STATUTORY NOTES

Compiler's Notes.

These sections, which comprised C.C.P. 1881, §§ 138 — 140; R.S., R.C., & C.L., §§ 4020 — 4022; C.S., §§ 6591 — 6593; I.C.A., §§ 5-101 — 5-103, were repealed by S.L. 1975, ch. 242, § 1, effective March 31, 1975. For present law, see Idaho Civil Procedure Rules 2, 3(a), 16(a) to 16(i), 38(c).

CHAPTER 2

LIMITATION OF ACTIONS

5-201. Limitations in general. — Civil actions can only be commenced within the periods prescribed in this chapter after the cause of action shall have accrued, except when, in special cases, a different limitation is prescribed by statute.

History.

C.C.P. 1881, § 141; R.S., R.C., & C.L., § 4030; C.S., § 6594; I.C.A., § 5-201.

STATUTORY NOTES

Cross References.

Contractual limitations invalid, § 29-110.

Decedent's cause of action, limitations on, § 15-3-109.

Decedent's estates, claims of creditors, limitations on, §§ 15-3-802, 15-3-803.

Decedent's estates, rejected claim four months after notice, § 15-3-803.

Decedent's unclaimed property, § 14-113.

Distributees, limitations on actions and proceedings against, § 15-3-1006.

Divorce, § 32-615.

Escheated property, § 14-113.

Livestock, railroad injuring and killing, notice of claim, suit, § 62-408.

Marriage annulment actions, § 32-502.

Mechanics' liens, § 45-510.

Money found on body of decedent, § 31-2118.

Overcharges by public utility, recovery, § 61-642.

Personal representative, limitation on proceedings against, § 15-3-1005.

Pleading the statute of limitations, Idaho Civil Procedure Rule 9(h).

Probate proceedings, limitation on commencement of, § 15-3-108.

School, road, herd districts, presumption of validity, § 31-857.

State warrants, checks outstanding, § 67-1213.

Worker's compensation, proceedings, reviews, §§ 72-701, 72-705, 72-706.

JUDICIAL DECISIONS

ANALYSIS

Amendment of Complaint.

Under the Federal Employers' Liability Act, where a wife sued in her individual capacity for damages for the death of her husband who was an employee of a railroad company, when the action should have been brought in the name of the personal representative, the court held that, after the period of limitation had run, she might be granted the right to substitute herself as administratrix, and the plea of the bar of statute of limitation would be overruled, since that would not be the commencement of a new action. Missouri, Kan. & Tex. Ry. v. Wulf, 226 U.S. 570, 33 S. Ct. 135, 57 L. Ed. 355 (1913).

A married woman has such an interest in the cause of action for personal injuries to herself that she may commence and prosecute to a final judgment an action for recovery on account of negligence causing the same, unless objection is made on the ground of the lack of parties; when such an objection is made, a husband may be made a party to such action by amending the complaint and making the husband a party; bringing in of the husband in this manner, after the expiration of the statutory period of limitations, constitutes no new or different cause of action, and the action may, thereafter, be maintained by the husband and wife jointly. Muir v. Pocatello, 36 Idaho 532, 212 P. 345 (1922).

Where an amendment to a pleading introduces a new or different cause of action and makes a new or different demand, the statute of limitations continues to run until the amendment is actually filed. Denton v. Detweiler, 48 Idaho 369, 282 P. 82 (1929).

An amendment to a complaint in an action under the Federal Employees' Liability Act for personal injuries, continued after his death by his administratrix, alleging the death of the original plaintiff as a result of the injury and demanding a judgment in a single sum for the cause of injury sustained by the deceased during his lifetime, and the pecuniary loss resulting from his death, introduces a new and distinct cause of action and, therefore, does not relate back to the beginning of the action so as to avoid the bar of statute of limitations. B & O.S.W.R.R. v. Carroll, 280 U.S. 491, 50 S. Ct. 182, 74 L. Ed. 566 (1930).

Claim by Subrogation.

Where a truck was damaged in a collision on March 16, 1971, the three year statute on tort claims barred insured lessee's tort claim as of March 16, 1974, and the insurer's claim by subrogation was likewise barred since the subrogee had no greater rights and was subject to the same statute of limitations. May Trucking Co. v. International Harvester Co., 97 Idaho 319, 543 P.2d 1159 (1975).

Commencement of Running of Statute.

The statute does not begin to run against a cestui que trust until the trust is denied or some act is done by the trustee inconsistent with the trust. Nasholds v. McDonell, 6 Idaho 377, 55 P. 894 (1898), overruled on other grounds, Rice v. Rigley, 7 Idaho 115, 61 P. 290 (1900).

When one by his own carelessness or negligence fails to acquire knowledge that is within his reach, the person cannot protect himself behind the plea that he did not know the facts. Coe v. Sloan, 16 Idaho 49, 100 P. 354 (1909).

An express trust as well as an implied one is repudiated by adverse possession and the statutes of limitation begin to run from time of such repudiation. Coe v. Sloan, 16 Idaho 49, 100 P. 354 (1909).

Where there is no fraud shown, neither the ignorance of the person of the right to bring an action nor the mere silence of the person liable to the action will prevent the running of the statute of limitations. Coe v. Sloan, 16 Idaho 49, 100 P. 354 (1909).

When the fact of death is established by the presumption arising from seven years' unexplained absence of a person, a cause of action on a benefit certificate payable upon the death of such person does not accrue until the end of the seven-year period of disappearance. Gaffney v. Royal Neighbors of Am., 31 Idaho 549, 174 P. 1014 (1918).

Right of action on absolute contract of guaranty accrues immediately upon the breach of the obligation guaranteed. Rawleigh Medical Co. v. Atwater, 33 Idaho 399, 195 P. 545 (1921).

Where contract contains acceleration clause positive in terms, default under such clause renders entire indebtedness due and statute runs from such default. Perkins v. Swain, 35 Idaho 485, 207 P. 585 (1922).

Statute of limitations does not begin to run against an action based upon fraud until the plaintiff in the exercise of proper diligence discovers the facts constituting the fraud. Ryan v. Old Veteran Mining Co., 37 Idaho 625, 218 P. 381 (1923).

Statute does not begin to run against voluntary, continuing trust obligation, resting in parol, until the trustee begins to act in hostility to the obligation, and knowledge of the repudiation is brought home to the cestui que trust. Davenport v. Bird, 45 Idaho 280, 261 P. 769 (1927); Brasch v. Brasch, 55 Idaho 777, 47 P.2d 676 (1935).

If holder of a municipal warrant issued under a contract relation has a remedy which he may pursue at the time of its issuance, the statute of limitations begins to run then, but if he has no remedy at that time, it begins to run when his remedy thereafter accrues. Little v. Emmett Irrigation Dist., 45 Idaho 485, 263 P. 40 (1928).

Where an indefinite delay in making demand for performance is contemplated by the terms of the contract, the period of the statutes of limitation will not be held to be the measure of time in which demands should be made. Johnston v. Keefer, 48 Idaho 42, 280 P. 324 (1929).

Where obstructions placed in defendant's dam caused periodic flooding of plaintiff's land, statute of limitations began to run from date of each periodic overflowing. Lavin v. Panhandle Lumber Co., 51 Idaho 1, 1 P.2d 186 (1931).

Where a foreign object is negligently left in a patient's body by his physician and the patient is in ignorance of the fact and consequently of his right of action for malpractice, the cause of action does not accrue until the patient learns of, or in the exercise of reasonable care and diligence should have learned of, the presence of such foreign object in his body. Billings v. Sisters of Mercy, 86 Idaho 485, 389 P.2d 224 (1964).

The limitation of § 5-219 with respect to an action for medical malpractice based upon a faulty diagnosis begins to run at the time of the alleged malpractice and not when plaintiff knew or by the exercise of reasonable diligence should have known of such malpractice and the resulting injury to her. Owens v. White, 380 F.2d 310 (9th Cir. 1967).

In an action against physician by patient and her husband to recover for malpractice involving alleged misdiagnosis and negligent treatment, the statute of limitations did not begin to run until the plaintiff knew or should have known of the defendant's negligence. Renner v. Edwards, 93 Idaho 836, 475 P.2d 530 (1969).

Court of Equity.

A court of equity is not bound to apply statute of limitations if it works an injustice to the creditor, and unusual conditions or extraordinary circumstances make it inequitable. Cummings v. Langroise, 36 F. Supp. 174 (D. Idaho 1940), aff'd 123 F.2d 969 (9th Cir. 1941), cert. denied, 316 U.S. 664, 62 S. Ct. 944, 86 L. Ed. 1741 (1942).

Where the plaintiff who had loaned decedent large sums of money under circumstances, and at times, when it was greatly needed in the preservation of the decedent's estate, to support himself, and for the payment of numerous large counsel fees, and upon decedent's death, the plaintiff brought action for the amount of the loans and sought the enforcement of a lien on the interest of the decedent in an estate, a federal district court sitting as a court of equity would not adjudge that recovery was barred by the five-year statute of limitations even if it could properly do so. Cummings v. Langroise, 36 F. Supp. 174 (D. Idaho 1940), aff'd 123 F.2d 969 (9th Cir. 1941), cert. denied, 316 U.S. 664, 62 S. Ct. 944, 86 L. Ed. 1741 (1942).

Effect of Bar.

A complaint may state a good cause of action and be sufficient to support a judgment although it shows conclusively upon its face that the cause of action is barred by the statute of limitations. Rosa v. Devingenzo, 53 Idaho 213, 24 P.2d 1051 (1933).

The running of the statute of limitations does not pay a debt nor satisfy an obligation. It is a mere privilege personal only to the party liable and is only a statute of repose. Anderson v. Ferguson, 56 Idaho 554, 57 P.2d 325 (1936).

Equitable Rights.

The statute is as complete a bar in equity as at law. Ames v. Howes, 13 Idaho 756, 93 P. 35 (1907); Steinour v. Oakley State Bank, 49 Idaho 293, 287 P. 949 (1930).

Ownership of the equitable title and possession within the time limited is sufficient to enable plaintiff to sue. American Mining Co. v.

Trask, 28 Idaho 642, 156 P. 1136 (1915).

General Application.

Statutes of limitation act upon the remedy only and not upon the debt. Kelly v. Leachman, 3 Idaho 629, 33 P. 44 (1893); Sterrett v. Sweeney, 15 Idaho 416, 98 P. 418 (1908).

—Malpractice.

General rule is that defense of statute of limitations is not available during pendency of action unless claim was barred when action was commenced. Denton v. Detweiler, 48 Idaho 369, 282 P. 82 (1929).

Statutes of limitation apply both to equity and law cases. Steinour v. Oakley State Bank, 49 Idaho 293, 287 P. 949 (1930).

Legal malpractice action was barred by a two-year statute of limitations because "some damage" occurred when property was transferred to a trust to gain a tax advantage since two clients could have reformed the trust at that time to correct any defects; therefore, a district court did not err by granting summary judgment in favor of several lawyers. Anderson v. Glenn, 139 Idaho 799, 87 P.3d 286 (2003).

Where a patient eventually lost her sight after cataract surgery in October 1999, the only issue of negligence presented concerned the doctor's post-operative care. The patient's claim could not have accrued before the first incident of alleged malpractice, which was on November 12, 1999. The patient filed her request for a prelitigation screening panel on November 8, 2001, less than two years after the alleged act of malpractice, so her claim was not barred by the statute of limitations. Conway v. Sonntag, 141 Idaho 144, 106 P.3d 470 (2005).

—Breach of Warranty.

Action for breach of warranty that land sold is practically free from alkali, although brought in equitable form, is not barred until the statute of limitations has expired, unless the delay is inexcusable or unless special circumstances exist which make it inequitable to permit recovery. Wilson v. Sunnyside Orchard Co., 33 Idaho 501, 196 P. 302 (1921).

—Counties.

The statute runs against an action by the county to recover money wrongfully withheld by a county officer as a fiduciary in trust for the county from the time the money was wrongfully received. Bannock County v. Bell, 8 Idaho 1, 65 P. 710 (1901). See also Blaine County v. Butte County, 45 Idaho 193, 261 P. 338 (1927); Lemhi County ex rel. Gilbreath v. Boise Livestock Loan Co., 47 Idaho 712, 278 P. 214 (1929).

—Decedents' Estates.

Provisions of probate code concerning claims against decedents' estates present a statutory scheme superseding in cases of death the general limitations applicable to obligations not barred at the time of death. Langroise v. Cummings, 123 F.2d 969 (9th Cir. 1941), cert. denied, 316 U.S. 664, 62 S. Ct. 944, 86 L. Ed. 1741 (1942).

—Defenses.

So long as a party who has a cause of action delays to enforce it in a legal tribunal, so long will any legal defense to that action be protected from the bar of the lapse of time. United States v. Clark, 96 U.S. 37, 24 L. Ed. 696 (1878).

Statutes of limitation do not apply to pure defenses, but are applicable only where affirmative relief is sought. Frank v. Davis, 34 Idaho 678, 203 P. 287 (1921); Morton v. Whitson, 45 Idaho 28, 260 P. 426 (1927).

—Deposits in Court.

There is no provision of law by which lapse of time will either bar a claimant from asserting his right to funds deposited in court to abide the court's order, or prevent the court hearing his application and directing the fund to be paid to the one rightly entitled thereto. Anderson v. Ferguson, 56 Idaho 554, 57 P.2d 325 (1936).

Property or funds *in custodia legis* are not liable to be seized, and, therefore, the statute of limitations does not with respect thereto run as to rights and liabilities arising therefrom. Anderson v. Ferguson, 56 Idaho 554, 57 P.2d 325 (1936).

—Irrigation District Warrant.

Statute of limitation runs against warrants issued by an irrigation district both in an action to place the warrants in judgment or in a mandamus proceeding. Tingwall v. King Hill Irrigation Dist., 66 Idaho 76, 155 P.2d 605 (1945).

—Malpractice.

The gist of a malpractice action is negligence and not a breach of the contract of employment; while the contract rule is still used occasionally it is generally recognized as being more of a device than a valid rule of law. Billings v. Sisters of Mercy, 86 Idaho 485, 389 P.2d 224 (1964).

—Mortgage Contract.

Where the mortgage form used by the parties was a pre-printed form obtained from a title company with not all the blanks filled in, specifically the paragraph containing the acceleration clause, none of these blanks rendered the acceleration clause paragraph vague or unenforceable nor did the blanks alone indicate that the parties intended to delete the acceleration clause. Parrott v. Wallace, 127 Idaho 306, 900 P.2d 214 (Ct. App. 1995).

—Municipal Corporations.

As a general rule, statutes of limitation run in favor of as well as against municipalities. Little v. Emmett Irrigation Dist., 45 Idaho 485, 263 P. 40 (1928).

—Personal Injury.

Based on these two sections, this and § 5-219, a civil action to recover damages for injury to the person, caused by the wrongful act or negligence of another, can only be commenced within two years after the cause of action shall have accrued. Billings v. Sisters of Mercy, 86 Idaho 485, 389 P.2d 224 (1964).

—Quiet Title.

Where appellee sued to quiet title against canal company in federal court but did not plead that canal company's maintenance liens were barred by the statute of limitations and the canal company brought suit in a state court to foreclose its liens, the state court was competent to determine whether the suit in the state court was filed within the time limited and in the proper tribunal, and appellee was left to its remedy in the suit in the state court. North Side Canal Co. v. Idaho Farms Co., 109 F.2d 354 (9th Cir. 1940).

Record notice of existence and nonpayment of mortgage does not entitle purchaser of mortgaged land to quiet title as against mortgage though debt is barred by limitation period, if purchaser is in privity with original mortgagor and knows that mortgage in fact has not been paid. Trusty v. Ray, 73 Idaho 232, 249 P.2d 814 (1952).

—Railroad Right-of-Way.

The statute of limitations will not run against an action by a railroad to maintain the integrity of the right-of-way granted by congress for the specific use and purpose of said railroad. Oregon S.L.R.R. v. Quigley, 10 Idaho 770, 80 P. 401 (1905).

—Setoff and Counterclaim.

Statutes of limitation apply as well to a sum attempted to be set off as to one on which an action is brought. Wonnacott v. Kootenai County, 32 Idaho 342, 182 P. 353 (1919).

A statute of limitations does not apply to a pure defense, but is applicable to forestall the granting of affirmative relief. Frank v. Davis, 34 Idaho 678, 203 P. 287 (1921); Morton v. Whitson, 45 Idaho 28, 260 P. 426 (1927).

A pure setoff — no affirmative relief being sought — is not subject to the statute of limitations. Zimmerman v. Dahlberg, 46 Idaho 583, 269 P. 991 (1928).

A counterclaim is subject to the statutes of limitation. Denton v. Detweiler, 48 Idaho 369, 282 P. 82 (1929).

Although an action for money loaned by a decedent to one of his heirs has been barred by the statute of limitation, the debt itself is not thereby extinguished, but may be set off against such heir's distributive share of the estate. Hirning v. Webb, 91 Idaho 229, 419 P.2d 671 (1966).

—Trusts.

Trusts which arise from implication of law, or constructive trusts, are subject to the operation of the statute unless there has been fraudulent concealment of the cause of action, and the statute is as complete a bar in equity as at law. Ames v. Howes, 13 Idaho 756, 93 P. 35 (1907).

Express trusts are those which are created by direct and positive acts of the parties by writing, deed, or will and are not within the operation of the statutes of limitation. Ames v. Howes, 13 Idaho 756, 93 P. 35 (1907).

The period of limitations against a continuing, express or voluntary trust is four years. Brasch v. Brasch, 55 Idaho 777, 47 P.2d 676 (1935).

Interruption of Running of Statutes.

Neither the ignorance of a person of his right to bring an action, nor the mere silence of a person liable to the action prevents the running of the statute of limitations. Ames v. Howes, 13 Idaho 756, 93 P. 35 (1907); Coe v. Sloan, 16 Idaho 49, 100 P. 354 (1909).

A party who mistakes his remedy and seeks relief in a federal court does not thereby stop the running of the statute of limitations in the state court. Connolly v. Reed, 22 Idaho 29, 125 P. 213 (1912). See also Finney v. American Bonding Co., 13 Idaho 534, 90 P. 859 (1907); Morbeck v. Bradford-Kennedy Co., 19 Idaho 83, 113 P. 89 (1910).

If amendment of complaint introduces new or different cause of action or makes new or different demand, statute continues to run until amendment is filed; but if it does not set up a new cause, it relates back to the filing of the original complaint, and running of the statute is arrested at that point. Denton v. Detweiler, 48 Idaho 369, 282 P. 82 (1929).

Part payment on a note is equivalent to new promise in writing of date of payment. Vollmer Clearwater Co. v. Hines, 49 Idaho 563, 290 P. 397 (1930).

Knowledge of Cause of Action.

Where plaintiff's suit for a malpractice occurring in 1948 was based upon the discovery of a sponge in plaintiff's body revealed by exploratory operation in 1961, cause of action was not barred by the statute of limitations even though the suit was not brought until 1962. Billings v. Sisters of Mercy, 86 Idaho 485, 389 P.2d 224 (1964).

Pleading and Practice.

Where a cause of action is stated and the answer pleads the statute of limitations, it is error to sustain the defendant's motion for a

judgment on the pleadings even though the complaint shows the cause of action to be barred. Chemung Mining Co. v. Hanley, 9 Idaho 786, 77 P. 226 (1904). See, however, McLeod v. Stelle, 43 Idaho 64, 249 P. 254 (1926); Smith v. Oregon Short Line R.R., 47 Idaho 604, 277 P. 570 (1929); Whiffin v. Union P.R.R., 60 Idaho 141, 89 P.2d 540 (1939).

If statute of limitations is not pleaded, it will be deemed abandoned and can not be taken advantage of on objection to admissibility of the evidence. McLeod v. Rogers, 28 Idaho 412, 154 P. 970 (1916).

Where defendant alleges in answer title to easement gained by prescription, he does not waive plea of statute of limitations because pleadings refer to section of statute that does not apply in particular case. Last Chance Ditch Co. v. Sawyer, 35 Idaho 61, 204 P. 654 (1922).

The question of the statute of limitations must be urged in the lower court or it is deemed to be waived and can not be raised for the first time in the supreme court on appeal. Aker v. Coleman, 60 Idaho 118, 88 P.2d 869 (1939).

Cited in: Anthes v. Anthes, 21 Idaho 305, 121 P. 553 (1912); Perkins v. Swain, 35 Idaho 485, 207 P. 585 (1922); Summers v. Wallace Hosp., 276 F.2d 831 (9th Cir. 1960); Stockmen's Supply Co. v. Jenne, 72 Idaho 57, 237 P.2d 613 (1951); Christensen v. West, 92 Idaho 87, 437 P.2d 359 (1968); Twin Falls Clinic & Hosp. Bldg. Corp. v. Hamill, 103 Idaho 19, 644 P.2d 341 (1982); Southern Idaho Prod. Credit Ass'n v. Ruiz, 105 Idaho 140, 666 P.2d 1151 (1983); Carman v. Carman, 114 Idaho 551, 758 P.2d 710 (Ct. App. 1988); J.R. Simplot Co. v. Chemetics Int'l, Inc., 126 Idaho 532, 887 P.2d 1039 (1994); Western Corp. v. Vanek, 144 Idaho 150, 158 P.3d 313 (Ct. App. 2006).

RESEARCH REFERENCES

Am. Jur. — 51 Am. Jur. 2d, Limitation of Actions, §§ 243 to 252, 257, 259 to 262.

C.J.S. — 54 C.J.S., Limitations of Actions, § 260 et seq.

A.L.R. — Insurer's waiver of defense of statute of limitations. 104 A.L.R.5th 331.

5-202. Actions by state. — The people of this state will not sue any person for or in respect to any real property or the issues or profits thereof, by reason of the right or title of the people to the same, unless:

1. Such right or title shall have accrued within ten (10) years before any action or other proceeding for the same is commenced; or,

2. The people or those from whom they claim, shall have received the rents and profits of such real property, or of some part thereof, within the space of ten (10) years.

History.
C.C.P. 1881, § 142; R.S., R.C., & C.L., § 4035; C.S., § 6595; I.C.A., § 5-202.

STATUTORY NOTES

Cross References.
State suing, application of statute of limitations, § 5-225.

JUDICIAL DECISIONS

Analysis

Adverse possession.
Commencement of running of statute.
Immunity of federal government.
School trust funds.

Adverse Possession.

Title by adverse possession cannot be acquired against the state; this section does not bar suit by state to recover lands reserved for, or dedicated to, some public use, such as school land. Hellerud v. Hauck, 52 Idaho 226, 13 P.2d 1099 (1932).

Church's occupation of state land held under certificate of purchase, prior to full payment of the purchase price by the certificate holder, is an unlawful possession of state land upon which no claim of adverse possession can be based. Hellerud v. Hauck, 52 Idaho 226, 13 P.2d 1099 (1932).

There are certain categories of state-owned land which are immune from acquisition by adverse possession; the court having previously held that there are two such categories — land dedicated to a public use and school endowment land; however, the former bed of a navigable river which changed its course falls in no immune category. Rutledge v. State, 94 Idaho 121, 482 P.2d 515 (1971).

When the reason for holding property in trust for the public benefit ceases, it is no longer a unique or special benefit to the general public; and the reasons for clothing such property with a protective shield of immunity from acquisition by adverse possession also became meaningless. Rutledge v. State, 94 Idaho 121, 482 P.2d 515 (1971).

Commencement of Running of Statute.

In a case of periodic flooding the statute of limitations would begin to run from the date of each periodic flooding. Lavin v. Panhandle Lumber Co., 51 Idaho 1, 1 P.2d 186 (1931).

Statute begins to run against a grantee of the state only from the time he acquires title, and any occupancy prior to that time will not be deemed possession against the state. Hellerud v. Hauck, 52 Idaho 226, 13 P.2d 1099 (1932).

Immunity of Federal Government.

The federal government is not bound by a statute of limitations in the absence of a clear manifestation of such intention, and the United States has nowhere indicated its intention to be bound by the statute of limitations of Idaho. Schodde v. United States, 69 F.2d 866 (9th Cir. 1934).

School Trust Funds.

Statute of limitations did not apply to mortgage lien of state covering permanent endowment school trust fund. United States v. Fenton, 27 F. Supp. 816 (D. Idaho 1939).

Cited in: Von Rosenberg v. Perrault, 5 Idaho 719, 51 P. 774 (1898).

RESEARCH REFERENCES

Am. Jur. — 51 Am. Jur. 2d, Limitation of Actions, § 85.

C.J.S. — 54 C.J.S., Limitations of Actions, § 25 et seq.

5-203. Action to recover realty. — No action for the recovery of real property, or for the recovery of the possession thereof, can be maintained, unless it appears that the plaintiff, his ancestor, predecessor or grantor, was seized or possessed of the property in question within twenty (20) years before the commencement of the action; and this section includes possessory rights to lands and mining claims.

History.

C.C.P. 1881, § 143; R.S., R.C., & C.L., § 4036; C.S., § 6596; I.C.A., § 5-203; am. 2006, ch. 158, § 1, p. 474.

STATUTORY NOTES

Cross References.

Adverse possession, requisites, §§ 5-207 – 5-213.

Amendments.

The 2006 amendment, by ch. 158, substituted "twenty (20) years" for "five (5) years."

JUDICIAL DECISIONS

ANALYSIS

Administrator's account eliminating plea.
Adverse nature of possession.
Coupling of interests.
Easements.

Equitable rights.
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Gates.
General public.
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Prescriptive period.
Privity.
Quiet title actions.
Rebuttal of permissive use.
Review.
Seizin and possession.
Trusts.
Unimproved land.
Unpatented land.
Unpatented mining claims.
Water rights.

Administrator's Account Eliminating Plea.

Where an administrator's payments of interest on mortgage indebtedness were approved by the probate court and the administrator's account, including the final account, acknowledged liability on the note and mortgage, the order settling the final account and distributing the realty involved subject to the lien of the mortgage, which order was permitted to become final by a lapse of time, was conclusive on the validity of the mortgage and could not be collaterally attacked on the ground that the note and mortgage were barred by the statute of limitations. Horn v. Cornwall, 65 Idaho 115, 139 P.2d 757 (1943).

Adverse Nature of Possession.

By the execution and delivery of a deed of land the entire legal title in the premises vests in the grantee, and if the grantor continues in possession afterward, his possession will be that of either a tenant or trustee of the grantee and he will be regarded as holding the premises in subserviency to the grantee and nothing short of an explicit disclaimer of such relation and a notorious assertion of right in himself will be sufficient to change the character of his possession and render it adverse to the grantee. Trask v. Success Mining Co., 28 Idaho 483, 155 P. 288 (1916).

One who establishes his legal title to real estate is presumed to have been possessed of the property within the meaning of this statute, and its occupation by another is deemed to have been in subordination to the legal title, unless it appears that it has been held and possessed adversely to such legal title for five [now 20] years; and where there is no proof showing that actual occupation was accompanied by a claim, or an intention, inconsistent with the title of the owner, an adverse claim based upon such occupation cannot be allowed. Bower v. Kollmeyer, 31 Idaho 712, 175 P. 964 (1918).

Uninterrupted and continuous possession for the prescriptive period raises the presumption that it was adverse and under claim of right. Bachman v. Reynolds Irrigation Dist., 56 Idaho 507, 55 P.2d 1314 (1936); Northwestern & Pac. Hypotheekbank v. Hobson, 59 Idaho 119, 80 P.2d 793 (1938).

If the owner of the property fails to eject the trespasser or enjoin the unauthorized use, after five [now 20] years his right to do so will be barred as against those who had actually made open, notorious, continuous, uninterrupted use, under a claim of right, with the knowledge of the owner, for the five [now 20] year period, but those persons who had not made such use could be enjoined from further interfering with the owner's superior rights. State ex rel. Haman v. Fox, 100 Idaho 140, 594 P.2d 1093 (1979).

In an action to quiet title where the evidence showed that two parcels, which were part of a boundary dispute, were farmed as one field, either by a tenant who rented both parcels or by the owner of one parcel who rented the other, there was no showing of an open, hostile use for the full prescriptive period. Nelson v. Wagner, 108 Idaho 570, 700 P.2d 973 (Ct. App. 1985).

Any claim of title under an adverse possession theory involves a showing of adverse use. Christle v. Scott, 110 Idaho 829, 718 P.2d 1267 (Ct. App. 1986).

Where no evidence is presented to establish how the use of a servient estate began, a presumption arises that the use is adverse and under claim of right; the owner of the servient estate must then rebut that presumption by showing the use is permissive or by virtue of a license, contract or agreement. Christle v. Scott, 110 Idaho 829, 718 P.2d 1267 (Ct. App. 1986).

Where the claimant of a prescriptive easement testified that he originally thought there was a recorded easement across the land, he had never thought he was using the

road in derogation of anyone's rights, he never thought that he was in any way trespassing on the property, and his use had never interfered in any way with anyone else's use of the property, the evidence supported a finding of permissive use. Christle v. Scott, 110 Idaho 829, 718 P.2d 1267 (Ct. App. 1986).

A use initiated with permission may ripen into a prescriptive easement where the permission is later repudiated or revoked. Branson v. Miracle, 111 Idaho 933, 729 P.2d 408 (Ct. App. 1986).

Ordinarily, proof of open, notorious, uninterrupted use for the prescriptive period of five [now 20] years raises a presumption that the use was adverse. Branson v. Miracle, 111 Idaho 933, 729 P.2d 408 (Ct. App. 1986).

Coupling of Interests.

Claimant of a prescriptive easement can rely on the adverse use by the claimant's predecessor for the prescriptive period or the claimant may couple such predecessor's use with the claimant's own use to establish the requisite five [now 20] continuous years of adverse use; and, in the absence of any evidence indicating how the predecessor's use began, the claimant may invoke a rebuttable presumption that the use was adverse and under a claim of right as against the servient landowner; absent evidence to rebut the presumption, the claimant is entitled to rely on the presumption of adversity. Wood v. Hoglund, 131 Idaho 700, 963 P.2d 383 (1998).

Easements.

This section and §§ 5-204 — 5-206 are applicable to actions involving easements, since under law easements are real property. Beasley v. Engstrom, 31 Idaho 14, 168 P. 1145 (1917); Last Chance Ditch Co. v. Sawyer, 35 Idaho 61, 204 P. 654 (1922).

The right to conduct excess water upon and across land of another is an easement which may be obtained by prescription, and the period of adverse possession whereby it may be acquired is that mentioned in this section and §§ 5-204 and 5-206. Beasley v. Engstrom, 31 Idaho 14, 168 P. 1145 (1917).

Prescriptive right-of-way is acquired by open and continuous use for more than 5 [now 20] years. Northwestern & Pac. Hypotheekbank v. Hobson, 59 Idaho 119, 80 P.2d 793 (1938).

This section applied to claim for right of way for road and bridge. Bachman v. Reynolds Irrigation Dist., 56 Idaho 507, 55 P.2d 1314 (1936); Northwestern & Pac. Hypotheekbank v. Hobson, 59 Idaho 119, 80 P.2d 793 (1938).

Where, from the evidence, the trial court found that the driveway involved, a strip of land 10 feet wide along the boundary between lots owned by the respective parties, was used in common by the parties and their predecessors for parking, for access to garages and for taking fuel into basement apertures of the adjoining homes for a period of 21 years, and that such mutual use was not merely permissive but was such as would ripen into an easement by prescription and in fact into reciprocal and equal rights in the adjoining owners, such finding will not be disturbed on appeal. Sinnett v. Werelus, 83 Idaho 514, 365 P.2d 952 (1961).

In action to enjoin trespass on real estate and affirmative defense of right of way by prescriptive easement raised, where defendants made no claim in fee to the road across plaintiff's land but claimed easement over, upon, and across property admittedly owned in fee by plaintiff, the period of time necessary to establish the prescriptive right was measured by this section rather than by the provisions of §§ 5-209 and 5-210 which set forth the prerequisites to a claim of adverse possession. Deer Creek, Inc. v. Hibbard, 94 Idaho 533, 493 P.2d 392 (1972).

Evidence supported findings that road had been in usage more than five years prior to the commencement of the action, that the usage was not initiated in permission but as a claim of right and that said usage of the road was open, hostile, continuous, adverse and notorious so that defendants were entitled to prescriptive easement under this section. Deer Creek, Inc. v. Hibbard, 94 Idaho 533, 493 P.2d 392 (1972) (20 year prescriptive period, following 2006 amendment).

Use by tenants and their customers of landlord's adjoining property as a parking lot for less than five years was a permissive use and, thus, would not support a claim for adverse possession or prescriptive easement. Fajen v. Powlus, 96 Idaho 625, 533 P.2d 746 (1975) (20 year prescriptive period, following 2006 amendment).

Where a roadway across a parcel of land had been used since the early 1930's to provide access to adjoining property which was used for a single-family residence and for farming purposes until 1970, a prescriptive easement for such uses was established but such easement would not be expanded to include an increase in use caused by construction of a business and other residences after 1970, since this increased use had not continued for five years at the time the action was instituted. Gibbens v. Weisshaupt, 98 Idaho 633, 570 P.2d 870 (1977) (20 year prescriptive period, following 2006 amendment).

Where an adjoining landowner had used a roadway over the plaintiff's property from 1947 to the date of the commencement of the action and had regularly maintained the road which provided the only access to his property from 1964 to 1971, a prescriptive easement was created by means of continuous use for the period required by this section. Stecklein

v. Montgomery, 98 Idaho 671, 570 P.2d 1359 (1977).

Where a timber company contended that a prescriptive easement ensued from some travel by automobile over the plaintiffs' land a few times a year from 1924 to the present, the trial court properly found that, although such an easement might have been created, the construction of a logging road constituted an impermissibly expanded use of the easement. Elder v. Northwest Timber Co., 101 Idaho 356, 613 P.2d 367 (1980).

An easement for the purpose of draining excess irrigation water across the land of another may be acquired by prescription; however, the use of the easement by the dominant estate must be continuous for five years and must be made in a reasonable, careful and prudent manner. Judge v. Whyte, 109 Idaho 184, 706 P.2d 73 (Ct. App. 1985) (20 year prescriptive period, following 2006 amendment).

A prescriptive easement cannot be obtained if use of the servient estate is by permission of the owner. Christle v. Scott, 110 Idaho 829, 718 P.2d 1267 (Ct. App. 1986).

Requirements for a private prescriptive easement by a landowner on the property of an adjoining landowner were met where the landowner had used the property as a roadway for approximately 30 years and had applied gravel to keep weeds from growing in the portion used as a vehicle parking lot. Murray v. State, 116 Idaho 744, 779 P.2d 419 (Ct. App. 1989).

The district judge's basic findings, and the undisputed evidence, clearly established open, continuous, and uninterrupted use of road over the five-year statutory period. Absent from the record, however, were the necessary findings on the factual question of whether the use of road was adverse and under claim of right or whether the use was permissive. Therefore, judgment was vacated and remanded for additional findings and conclusions necessary for a determination of the prescriptive easement claim. Burns v. Alderman, 122 Idaho 749, 838 P.2d 878 (Ct. App. 1992).

Where court found that defendant's use of "turn-around" roadway had been permissive, court properly denied defendant's claim of a private prescriptive right of easement. Bumgarner v. Bumgarner, 124 Idaho 629, 862 P.2d 321 (Ct. App. 1993).

Use of a driveway in common with the owner and the general public, in the absence of some decisive act on the user's part indicating a separate and exclusive use on his part, negatives any presumption of individual right therein in his favor. Marshall v. Blair, 130 Idaho 675, 946 P.2d 975 (1997).

Use of a roadway must invade or infringe on the owner's rights in order for the use to be considered adverse and, thus, to ripen into a prescriptive right of way. Marshall v. Blair, 130 Idaho 675, 946 P.2d 975 (1997).

In a claim for a prescriptive easement, the trial court erred in finding permissive use, as uncontradicted testimony revealed that the claimant's use was without permission and the property owner knew of the use but never acted to curtail the usage, and there was no finding by the trial court that this testimony was not credible. Wood v. Hoglund, 131 Idaho 700, 963 P.2d 383 (1998).

Although defendants inspected the land prior to their purchase and observed the trails on the land, the testimony in the record merely established that the defendants were aware of the trails at the time of purchase, and the mere appreciation of the abundant trails, without more, was insufficient to establish that the defendants were put on notice of a prescriptive easement across their land. Baxter v. Craney, 135 Idaho 166, 16 P.3d 263 (2000).

Plaintiff's testimony that he used a portion of the defendant's land to access his back yard for debris removal, and to travel to his parents' house, did not establish a prescriptive easement where the court found contradictory testimony more credible. Anderson v. Larsen, 136 Idaho 402, 34 P.3d 1085 (2001).

One plaintiff landowner's predecessor had maintained the road which ran across defendant landowner's property, and that maintenance was sufficient for tacking under this section, if, on remand, the trial court made findings as to that predecessor's use of defendants' property; but it was error to find that maintenance was sufficient to rebut a presumption of permissive use without evidence that defendants or their predecessors refused to participate in a maintenance association established by the several plaintiff landowners. Hodgins v. Sales, 139 Idaho 225, 76 P.3d 969 (2003).

Denial of prescriptive easement claim was affirmed because the district court properly concluded that the first neighbor used the path along with the general public and performed no independent act that would have put the owner on notice the first neighbor was claiming a prescriptive easement over his land. Hughes v. Fisher, 142 Idaho 474, 129 P.3d 1223 (2006).

Factual findings supported a district court's conclusion that the claimants' use of a road was open and notorious, continuous and uninterrupted, with the actual knowledge of adjoining landowners, and for the five-year [now 20-year] statutory period. The claimants, thus, acquired a prescriptive easement against adjoining landowners. Beckstead v. Price, 146 Idaho 57, 190 P.3d 876 (2008).

A party seeking to establish the existence of an easement by prescription must prove by

clear and convincing evidence that use of the subject property was: (1) open and notorious, (2) continuous and uninterrupted, (3) adverse and under a claim of right, (4) with the actual or imputed knowledge of the owner of the servient tenement, and (5) for the statutory period. Backman v. Lawrence, 147 Idaho 390, 210 P.3d 75 (2009).

Equitable Rights.

The statute is as complete a bar in equity as at law. Ames v. Howes, 13 Idaho 756, 93 P. 35 (1907); Steinour v. Oakley State Bank, 49 Idaho 293, 287 P. 949 (1930).

Ownership of the equitable title and possession within the time limited is sufficient to enable plaintiff to sue. American Mining Co. v. Trask, 28 Idaho 642, 156 P. 1136 (1915).

Establishment of Fence Line.

A fence is not converted into a boundary merely because it exists for the statutory period or longer especially where the appellants were in the actual exclusive, open, notorious, hostile, visible and adverse possession of the property in dispute. Trunnell v. Ward, 86 Idaho 555, 389 P.2d 221 (1964).

Where the fence was not on the true surveyed boundary between the properties, but the evidence indicated that the fence's location was a matter of convenience, winding and meandering according to the lay of the land, and it was used as a livestock fence rather than as a boundary fence, there was no evidence of adverse possession. Christle v. Scott, 110 Idaho 829, 718 P.2d 1267 (Ct. App. 1986).

Gates.

Where there was no indication that claimant made any showing that gate was unreasonable or unduly restrictive, district court erred when it determined that defendants were not entitled to install a gate. The gate, however, may not unduly restrict authorized use of the roadway; it must be easy to open and wide enough to accommodate claimant's and all other users' uses. Marshall v. Blair, 130 Idaho 675, 946 P.2d 975 (1997).

General Public.

In order to establish a right on behalf of the general public of this state to use private property for recreational purposes, a party must submit reasonably clear and convincing proof of open, notorious, continuous, uninterrupted use, under a claim of right, with the knowledge of the owner of the servient tenement, for the prescriptive period. State ex rel. Haman v. Fox, 100 Idaho 140, 594 P.2d 1093 (1979).

The "general public" or "the people of the state of Idaho," as distinguished from specific individuals, cannot, absent specific statutory authorization, acquire prescriptive rights to private property. State ex rel. Haman v. Fox, 100 Idaho 140, 594 P.2d 1093 (1979).

Interruption of Running of Statute.

If no fraud is shown, neither the ignorance of a person of his right to bring an action, nor the mere silence of the person liable to the action, prevents the running of the statute of limitations. Coe v. Sloan, 16 Idaho 49, 100 P. 354 (1909).

Minors.

Where co-tenant acquired real estate from other tenants after closing of estate, claim of minor heirs of one of the tenants to real estate was barred where claim was not asserted until 22 years after youngest minor reached majority. Chapin v. Stewart, 71 Idaho 306, 230 P.2d 998 (1951) (20 year prescriptive period, following 2006 amendment).

Pleading and Practice.

Where the facts showed that defendants had maintained an adverse possession for about 10 years prior to the commencement of plaintiff's action to recover realty, prosecution of the action was barred. Fountain v. Lewiston Nat'l Bank, 11 Idaho 451, 83 P. 505 (1905) (20 year prescriptive period, following 2006 amendment).

Where statute of limitations is pleaded in the answer, the court must make a finding upon such a defense unless a finding thereon would not affect or control the judgment or call for a different judgment than that authorized by the findings made. Hailey v. Riley, 14 Idaho 481, 95 P. 686 (1908).

In action by mayor of a city for cancellation of deeds conveying portions of the town-site, complaint did not show on its face that it was barred by statute of limitations. Hodges v. Lemp, 24 Idaho 399, 135 P. 250 (1913).

Where trial court granted nonsuit and dismissed action solely on ground of res adjudicata, and no evidence was introduced on question of statute of limitations, the supreme court could not pass on such question. Rogers v. Rogers, 42 Idaho 158, 243 P. 655 (1926).

This court has uniformly held that to avoid the bar of the statute, the circumstances, time and place of discovery and why the discovery was not sooner made must be alleged in detail and with particularity. Fortner v. Cornell, 66 Idaho 512, 163 P.2d 299 (1945).

The defense that complaint discloses cause of action barred by limitations must be raised by special demurrer or answer. Fortner v. Cornell, 66 Idaho 512, 163 P.2d 299 (1945).

Prescriptive Period.

The finding of the trial court that a road was a public easement was unsupported by any evidence and, therefore, was clearly erroneous, where the road had been paved and

maintained by the city since 1973, but the action was commenced in May of 1977. Aztec Ltd. v. Creekside Inv. Co., 100 Idaho 566, 602 P.2d 64 (1979) (See 2006 amendment).

Where the appellate court found there were disputed issues of fact as to whether the road was used for residential purposes continuously for the prescriptive period and what width the easement should have been, it reversed the decision of the district judge and remanded the case for presentation of further evidence. Brown v. Miller, 140 Idaho 439, 95 P.3d 57 (2004) (See 2006 amendment).

Privity.

Privity, for the purposes of tacking a prior owner's adverse use, may be established if the parties occupy the relationship of grantor and grantee and it is understood by a grantor and grantee that the area in question was included within the terms of the conveyance. It is not necessary that the land in question be described in the conveying instrument. Marshall v. Blair, 130 Idaho 684, 946 P.2d 984 (Ct. App. 1996).

Quiet Title Actions.

Where the plaintiff in a suit against a canal company to quiet title to land and water rights did not plead the company claimed maintenance liens were barred by the two year statute of limitations, and the statutory period for foreclosure of the 1935 liens had not expired when the quiet title suit was filed, the plaintiff was confined to its remedy in collateral suits which had been brought in the state court by the company to foreclose liens. North Side Canal Co. v. Idaho Farms Co., 109 F.2d 354 (9th Cir. 1940).

In an action to quiet title, evidence that the plaintiff had held the land under color of title for more than the prescriptive period justifies the finding in his favor. Stickel v. Carter, 63 Idaho 78, 117 P.2d 477 (9th Cir. 1941).

Where purchasers of tax title for unpaid 1932 taxes entered into possession in 1933 and instituted quiet title suit which was decided in 1950 adversely to tax title purchasers and in favor of property owners, which decree was affirmed on appeal, and daughter of tax title purchasers instituted quiet title proceeding in 1951 pending appeal of prior case, the property owners though out of actual possession were in constructive possession of property since they had established legal title to property at the time daughter's suit was instituted. Salvis v. Lawyer, 73 Idaho 469, 253 P.2d 589 (1953).

Where defendant's predecessor in title for a period of 40 years claimed disputed area south of original boundary fence by cultivating crops within disputed area, a claim by plaintiff's predecessor in title to disputed area on the ground that original boundary fence included some of his land, and statement by defendant that original boundary fence was probably not correct, did not prevent plaintiff's action to quiet title to disputed area from being barred by five year limitation period. Beneficial Life Ins. Co. v. Wakamatsu, 75 Idaho 232, 270 P.2d 830 (1954).

Where plaintiff, in suit to quiet title, is not relying on an oral contract for the conveyance of real property and is the holder of the legal title and defendant does not establish adverse possession, the defense of limitations under the statute is not established. Dickerson v. Brewster, 88 Idaho 330, 399 P.2d 407 (1965).

Where less than five years had elapsed between defendants' contract of purchase and subsequent purchaser plaintiff's bringing of an action to quiet title, no easement by prescription could have arisen during that time. Fajen v. Powlus, 96 Idaho 625, 533 P.2d 746 (1975) (now 20 years).

Rebuttal of Permissive Use.

Where use, when tacked, was open, notorious, continuous, uninterrupted, under a claim of right, and with the defendant's knowledge for the prescriptive period of five years; other landowner constructed gate; claimant utilized lane differently and additionally for access to their home; and claimant and other landowner disregarded no trespassing signs and cared for portion of lane, it was certainly established that claimant's use was not under grant of permission and was in excess of use by the general public. Therefore, claimants rebutted presumption of permissive use and were entitled to prescriptive right to use lane for access to and from their home and for any related agricultural pursuits that they conduct on their property. Marshall v. Blair, 130 Idaho 675, 946 P.2d 975 (1997) (now 20 years).

Review.

When reviewing a district court's determination that a private prescriptive easement exists, the supreme court must determine whether the district court properly applied the legal requirements for a prescriptive easement to the facts that the district court found. Marshall v. Blair, 130 Idaho 675, 946 P.2d 975 (1997).

Seizin and Possession.

Prima facie showing of legal title raises a presumption of seizin and possession for period of five years. Beneficial Life Ins. Co. v. Wakamatsu, 75 Idaho 232, 270 P.2d 830 (1954) (now 20 years).

Affirmative defenses of mutual agreement and long acquiescence in fence boundary, and adverse possession included defense of five year limitation period, since affirmative defenses pleaded were inconsistent with seizin and possession of disputed area by plaintiff. Beneficial Life Ins. Co. v. Wakamatsu, 75 Idaho 232, 270 P.2d 830 (1954) (now 20 years).

Trusts.

Express trusts are not within the operation of the statute of limitations, but trusts which arise from an implication of law or constructive trusts are within the operation of the statute. Ames v. Howes, 13 Idaho 756, 93 P. 35 (1907).

An express, as well as an implied, trust is repudiated by adverse possession, and the statute of limitations begins to run from the time the beneficiary has notice of such repudiation. Coe v. Sloan, 16 Idaho 49, 100 P. 354 (1909); Olympia Mining & Milling Co. v. Kerns, 24 Idaho 481, 135 P. 255 (1913), appeal dismissed, 236 U.S. 211, 35 S. Ct. 415, 59 L. Ed. 542 (1915).

Unimproved Land.

Where land over which prescription was claimed was unimproved until 1961 the general rule that open, notorious, continued and uninterrupted use for the prescriptive period without explanation of how it began raises a presumption that it was an adverse use and under a claim of right was not applicable, it applying only to improved lands. Trunnell v. Ward, 86 Idaho 555, 389 P.2d 221 (1964).

If the lands of the servient estate are wild, unenclosed, or unimproved, it is presumed that the use is permissive. Christle v. Scott, 110 Idaho 829, 718 P.2d 1267 (Ct. App. 1986).

Unpatented Land.

Actual issue of patent to state land is not necessary to start running of statute against purchaser; it begins to run when full equitable title vests in the grantee and all that remains to be done is to transfer the legal title — the issue and delivery of the patent. Hellerud v. Hauck, 52 Idaho 226, 13 P.2d 1099 (1932).

Unpatented Mining Claims.

Open, notorious, adverse possession of an unpatented mining claim for a period of more than five [now 20] years is a bar to an action to recover possession of the same. Bradley v. Johnson, 11 Idaho 689, 83 P. 927 (1906).

Water Rights.

Where plaintiff appropriated a certain number of inches of the waters of a creek in 1870, and continuously used the same, and defendant appropriated other waters of the creek in 1880 and used the same up to 1893, but without, until that time, interfering with plaintiff's use of the water claimed by him, plaintiff's right to sue to enforce his claim to the water as against the defendant was not barred by the statute of limitations. Brossard v. Morgan, 7 Idaho 215, 61 P. 1031 (1900).

Cited in: Malad Valley Irrigation Co. v. Campbell, 2 Idaho 411, 18 P. 52 (1888); Von Rosenberg v. Perrault, 5 Idaho 719, 51 P. 774 (1898); Daly v. Josslyn, 7 Idaho 657, 65 P. 442 (1901); Moss v. Ramey, 14 Idaho 598, 95 P. 513 (1908); McKinnon v. McIlhargey, 24 Idaho 720, 135 P. 826 (1913); Smith v. Yates, 25 Idaho 137, 136 P. 622 (1913); Zehner v. Castle, 27 Idaho 215, 148 P. 470 (1915); Gonzaga Univ. v. Masini, 42 Idaho 660, 249 P. 93 (1926); Lavin v. Panhandle Lumber Co., 51 Idaho 1, 1 P.2d 186 (1931); McGlochlin v. Coffin, 61 Idaho 440, 103 P.2d 703 (1940); Independence Placer Mining Co. v. Hellman, 62 Idaho 180, 109 P.2d 1038 (1941); Snyder v. Blake, 69 Idaho 14, 202 P.2d 394 (1949); Burns v. Skogstad, 69 Idaho 227, 206 P.2d 765 (1949); Smith v. Long, 76 Idaho 265, 281 P.2d 483 (1955); Downing v. Boehringer, 82 Idaho 52, 349 P.2d 306 (1960); Christensen v. West, 92 Idaho 87, 437 P.2d 359 (1968); Lisher v. Krasselt, 94 Idaho 513, 492 P.2d 52 (1972); West v. Smith, 95 Idaho 550, 511 P.2d 1326 (1973); Merrill v. Penrod, 109 Idaho 46, 704 P.2d 950 (Ct. App. 1985); Kaupp v. City of Hailey, 110 Idaho 337, 715 P.2d 1007 (Ct. App. 1986); Roberts v. Swim, 117 Idaho 9, 784 P.2d 339 (Ct. App. 1989); State v. Camp, 134 Idaho 662, 8 P.3d 657 (Ct. App. 2000); Merrill v. Gibson, 139 Idaho 840, 87 P.3d 949 (2004).

RESEARCH REFERENCES

Am. Jur. — 51 Am. Jur. 2d, Limitation of Actions, §§ 131 to 133, 157 to 159.

C.J.S. — 54 C.J.S., Limitations of Actions, § 56 et seq.

A.L.R. — Owner's surveying of land as entry thereon tolling running of statute of limitations for purposes of adverse possession. 76 A.L.R.3d 1202.

5-204. Action arising out of claim to title or rents or profits. — No cause of action, or defense to an action, arising out of the title to real property, or to rents or profits out of the same, can be effectual unless it appears that the person prosecuting the action, or making the defense, or under whose title the action is prosecuted or the defense is made, or the ancestor, predecessor or grantor, of such person, was seized or possessed of the premises in question within twenty (20) years before the commencement

of the act in respect to which such action is prosecuted or defense made.

History.
C.C.P. 1881, § 144; R.S., R.C., & C.L., § 4037; C.S., § 6597; I.C.A., § 5-204; am. 2006, ch. 158, § 2, p. 474.

STATUTORY NOTES

Amendments.
The 2006 amendment, by ch. 158, substituted "twenty (20) years" for "five (5) years."

JUDICIAL DECISIONS

Analysis

Adverse possession.
Color of title.
Easements.
Minors.
Permissive occupation.
Quiet title actions.
Review on appeal.
Setting aside sheriff's deed.
Vacation of streets.

Adverse Possession.

One who has purchased a tract of land and pays the purchase price and enters into possession believing he has title, whether he receives a good deed or an imperfect one, or none at all, nevertheless enters adversely to the vendor and all the rest of the world and holds possession adversely. Fountain v. Lewiston Nat'l Bank, 11 Idaho 451, 83 P. 505 (1905).

Burden is on party claiming right by prescription to show the extent and the amount of his use and of the right claimed. Last Chance Ditch Co. v. Sawyer, 35 Idaho 61, 204 P. 654 (1922).

Before adverse possession by one tenant in common against another can begin, the one in possession must, by the acts of the most open and notorious character, clearly show to the world, and to all having occasion to observe the condition and occupancy of the property, that his possession is intended to exclude and does exclude the rights of his cotenant. Vaughan v. Hollingsworth, 35 Idaho 722, 208 P. 838 (1922).

Possession, to be adverse, must have been for the whole period prescribed by statute, actual, open, visible, notorious, continuous and hostile to true owner and world at large. Pleasants v. Henry, 36 Idaho 728, 213 P. 565 (1923).

To acquire title to land by adverse possession, it is necessary to comply with all provisions of statute relating thereto. Meyer v. Schoeffler, 39 Idaho 500, 227 P. 1061 (1924).

In action by plaintiffs to quiet title to house and lot in 1951, the defendants who entered into possession of property under a deed in 1933 and who remained in possession thereafter either in person or by renters were owners of property by adverse possession and color of title. Obermeyer v. Idohl, 76 Idaho 103, 278 P.2d 188 (1954).

Color of Title.

Widow could not legally convey the entire title to community property, but a deed from her purporting to convey the entire title would give the grantee color of title under which he might obtain title by adverse possession. Coe v. Sloan, 16 Idaho 49, 100 P. 354 (1909).

Where plaintiff, in suit to quiet title, is not relying on an oral contract for the conveyance of real property and is the holder of the legal title and defendant does not establish adverse possession, the defense of limitations under the statute is not established. Dickerson v. Brewster, 88 Idaho 330, 399 P.2d 407 (1965).

Easements.

An easement for the purpose of drainage across the land of another may be acquired by prescription; such an easement is real property under the laws of Idaho, and the period of adverse possession is that mentioned in §§ 5-203 and 5-206. Beasley v. Engstrom, 31 Idaho 14, 168 P. 1145 (1917).

Minors.

Where co-tenant acquired real estate from other tenants after closing of estate, claim of minor heirs of one of the tenants to real estate was barred where claim was not asserted until 22 years after youngest minor reached majority. Chapin v. Stewart, 71 Idaho 306, 230 P.2d 998 (1951).

Permissive Occupation.

A prescriptive title can not be founded upon use and occupation, which is not adverse to the title of the owner, but which is under permission of owner. Davis v. Davenney, 7 Idaho 742, 65 P. 500 (1901).

A claimant of property who enters into possession under an agreement whereby, upon the happening of a contingency, he may be under the duty or necessity of restoring possession to the grantor or true owner holds possession for his grantor or the true owner and can not claim by adverse possession against him. Fountain v. Lewiston Nat'l Bank, 11 Idaho 451, 83 P. 505 (1905).

Where there is no proof showing that actual occupation was accompanied by a claim or an intention inconsistent with the title of the owner, an adverse claim based upon such occupation can not be allowed. Bower v. Kollmeyer, 31 Idaho 712, 175 P. 964 (1918).

Quiet Title Actions.

Where purchasers of tax title for unpaid 1932 taxes entered into possession in 1933 and instituted quiet title suit which was decided in 1950 adversely to tax title purchasers and in favor of property owners, which decree was affirmed on appeal, and daughter of tax title purchasers instituted quiet title proceeding in 1951 pending appeal of prior case, the property owners, though out of actual possession, were in constructive possession of property since they had established legal title to property at the time daughter's suit was instituted. Salvis v. Lawyer, 73 Idaho 469, 253 P.2d 589 (1953).

Review on Appeal.

Where the plea of statute of limitations in bar of action is neither argued nor briefed on appeal from a judgment for the defendants, it will not be considered by the supreme court. Malcolm v. Hanmer, 64 Idaho 66, 127 P.2d 331 (1942).

Setting Aside Sheriff's Deed.

An action to set aside a judgment and sheriff's deed based thereon is barred after the lapse of five [now 20] years from the execution of the deed, in the absence of a showing that reasonable diligence has been exercised in the discovery of the acts complained of. Ryan v. Woodin, 9 Idaho 525, 75 P. 261 (1904).

Vacation of Streets.

Action to have city ordinances vacating streets declared null and void should have been brought at least within five [now 20] years from the date such cause of action arose. Canady v. Coeur d'Alene Lumber Co., 21 Idaho 77, 120 P. 830 (1911).

Cited in: Hailey v. Riley, 14 Idaho 481, 95 P. 686 (1908); Moss v. Ramey, 14 Idaho 598, 95 P. 513 (1908); Hodges v. Lemp, 24 Idaho 399, 135 P. 250 (1913); McKinnon v. McIlhargey, 24 Idaho 720, 135 P. 826 (1913); Smith v. Yates, 25 Idaho 137, 136 P. 622 (1913); Zehner v. Castle, 27 Idaho 215, 148 P. 470 (1915); Trask v. Success Mining Co., 28 Idaho 483, 155 P. 288 (1916); Rogers v. Rogers, 42 Idaho 158, 243 P. 655 (1926); Gonzaga Univ. v. Masini, 42 Idaho 660, 249 P. 93 (1926); Steinour v. Oakley State Bank, 49 Idaho 293, 287 P. 949 (1930); Lavin v. Panhandle Lumber Co., 51 Idaho 1, 1 P.2d 186 (1931); Cell v. Drake, 61 Idaho 299, 100 P.2d 949 (1940); Snyder v. Blake, 69 Idaho 14, 202 P.2d 394 (1949); Burns v. Skogstad, 69 Idaho 227, 206 P.2d 765 (1949); Smith v. Long, 76 Idaho 265, 281 P.2d 483 (1955).

RESEARCH REFERENCES

Am. Jur. — 51 Am. Jur. 2d, Limitation of Actions, §§ 131 to 133, 157 to 159.

C.J.S. — 54 C.J.S., Limitations of Actions, § 64 et seq.

5-205. Effect of entry. — No entry upon real estate is deemed sufficient or valid as a claim unless an action be commenced thereupon within one (1) year after making such entry, and within five (5) years of the time when the right to make it descended or accrued.

History.

C.C.P. 1881, § 145; R.S., R.C., & C.L., § 4038; C.S., § 6598; I.C.A., § 5-205.

JUDICIAL DECISIONS

ANALYSIS

Commencement of action.
Permissive entry.

Commencement of Action.
An action under this section must be commenced within five years of the accrual of the right of entry. Smith v. Long, 76 Idaho 265, 281 P.2d 483 (1955).

Permissive Entry.
An adverse right is not originated by consent but rather against the will and without consent of the true owner, and generally rests on an original trespass, which matures into a property right by reason of the true owner allowing the claimant or trespasser to continue the adverse use and possession uninterruptedly and with assertion of right until the statutory period has run, which bars the true owner from either asserting or defending his right to the property. Hall v. Taylor, 57 Idaho 662, 67 P.2d 901 (1937); Northwestern & Pac. Hypotheekbank v. Hobson, 59 Idaho 119, 80 P.2d 793 (1938).

Cited in: Canady v. Coeur d'Alene Lumber Co., 21 Idaho 77, 120 P. 830 (1911); Wilson v. Linder, 21 Idaho 576, 123 P. 487 (1912); Gonzaga Univ. v. Masini, 42 Idaho 660, 249 P. 93 (1926); Burns v. Skogstad, 69 Idaho 227, 206 P.2d 765 (1949); Anselmo v. Beardmore, 70 Idaho 392, 219 P.2d 946 (1950).

5-206. Constructive possession. — In every action for the recovery of real property, or the possession thereof, a person establishing a legal title to the property is presumed to have been possessed thereof within the time required by law, and the occupation of the property by another person is deemed to have been under and in subordination to the legal title, unless it appears that the property has been held and possessed adversely to such legal title, for twenty (20) years before the commencement of the action.

History.
C.C.P. 1881, § 146; R.S., R.C., & C.L., § 4039; C.S., § 6599; I.C.A., § 5-206; am. 2006, ch. 158, § 3, p. 474.

STATUTORY NOTES

Amendments.
The 2006 amendment, by ch. 158, substituted "twenty (20) years" for "five (5) years."

JUDICIAL DECISIONS

Analysis

Adverse possession.
Canal company stock.
Defenses.
Easements.
Holder of legal title.
Municipal property.
Nonpayment of taxes.
Presumptions.
Quiet title actions.
Streets and highways.
Sufficiency of evidence.
Tax titles.
Water rights.

Adverse Possession.
Plaintiff was entitled to quiet title to disputed land where plaintiff's action was commenced a month after acquisition of title and less than five years after entry of defendant who claimed by adverse possession. Smith v. Long, 76 Idaho 265, 281 P.2d 483 (1955) (now 20 years).

Inasmuch as appellants failed to assume the burden of proof of their adverse possession of the disputed area, their alleged possession of such property under any other theory "is deemed to have been under and in subordination to the legal title" which respondents duly established with the accompanying presumption of respondents having been

"possessed thereof within the time required by law." Larson v. Lindsay, 80 Idaho 242, 327 P.2d 775 (1958).

Canal Company Stock.

Where it was shown that plaintiff had notice of defendants' open, notorious and uninterrupted use of water right represented by shares of stock of a canal company, by virtue of which the defendants gained prescriptive title thereto, the court properly quieted title to the stock in defendants. Pflueger v. Hopple, 66 Idaho 152, 156 P.2d 316 (1945).

Defenses.

Affirmative defenses of mutual agreement and long acquiescence in fence boundary, and adverse possession included defense of five year limitation period, since affirmative defenses pleaded were inconsistent with seizin and possession of disputed area by plaintiff. Beneficial Life Ins. Co. v. Wakamatsu, 75 Idaho 232, 270 P.2d 830 (1954) (20 year prescriptive period, following 2006 amendment).

Easements.

An easement for the purpose of drainage across land of another may be acquired by prescription; such an easement is real property, under the laws of Idaho, and the period of prescription is that mentioned in §§ 5-203 and 5-204 and this section. Beasley v. Engstrom, 31 Idaho 14, 168 P. 1145 (1917).

The burden is on the party claiming the right by prescription to show the extent and the amount of his use and of the right claimed. Last Chance Ditch Co. v. Sawyer, 35 Idaho 61, 204 P. 654 (1922).

Holder of Legal Title.

Where plaintiff, in suit to quiet title, is not relying on an oral contract for the conveyance of real property and is the holder of the legal title and defendant does not establish adverse possession, the defense of limitations under the statute is not established. Dickerson v. Brewster, 88 Idaho 330, 399 P.2d 407 (1965).

Municipal Property.

Property held by city not for a public purpose may be acquired by adverse possession as against city. Robinson v. Lemp, 29 Idaho 661, 161 P. 1024 (1916).

Nonpayment of Taxes.

The fact that appellants did not nor did their predecessors pay taxes and assessments levied against properties involved would defeat their cause of action seeking to establish fence as boundary of their and adjoining landowners' property. Larson v. Lindsay, 80 Idaho 242, 327 P.2d 775 (1958).

Presumptions.

Prima facie showing of legal title raises a presumption of seizin and possession for period of five years. Beneficial Life Ins. Co. v. Wakamatsu, 75 Idaho 232, 270 P.2d 830 (1954) (20 year prescriptive period, following 2006 amendment).

This section establishes a presumption that ownership of property lies in the person establishing legal or written title to it. Broadhead v. Hawley, 109 Idaho 952, 712 P.2d 653 (Ct. App. 1985).

Quiet Title Actions.

A motion for summary judgment would be better made in a quiet title action only after the defendant has answered and the issues are framed. Osterloh v. State, 100 Idaho 702, 604 P.2d 716 (1979).

Streets and Highways.

This section has no application whatever to public highways; the public never acquires the legal title to land over which a highway extends. Meservey v. Gulliford, 14 Idaho 133, 93 P. 780 (1908).

No title can be acquired in public streets by adverse possession. Hanson v. Proffer, 23 Idaho 705, 132 P. 573 (1913).

Sufficiency of Evidence.

Evidence was sufficient to establish in action to establish fence as boundary between adjoining land owners that plaintiff's title was not founded upon a written instrument, judgment or decree and that the disputed area had not been protected by a substantial inclosure by plaintiffs or their predecessors. Larson v. Lindsay, 80 Idaho 242, 327 P.2d 775 (1958).

Tax Titles.

Where purchasers of tax title for unpaid 1932 taxes entered into possession in 1933 and instituted quiet title suit which was decided in 1950 adversely to tax title purchasers and in favor of property owners, which decree was affirmed on appeal, and daughter of tax title purchasers instituted quiet title proceeding in 1951 pending appeal of prior case, the property owners, though out of actual possession, were in constructive possession of property since they had established legal title to property at the time daughter's suit was instituted. Salvis v. Lawyer, 73 Idaho 469, 253 P.2d 589 (1953).

Water Rights.

A water right, being real property, may be acquired through prescriptive title by adverse possession and use for more than the statutory period. Pflueger v. Hopple, 66 Idaho 152, 156 P.2d 316 (1945).

Cited in: Fountain v. Lewiston Nat'l Bank, 11 Idaho 451, 83 P. 505 (1905); Wilson v. Linder, 21 Idaho 576, 123 P. 487 (1912); Hodges v. Lemp, 24 Idaho 399, 135 P. 250 (1913); Bower v. Kollmeyer, 31 Idaho 712, 175

P. 964 (1918); Northwestern & Pac. Hypotheekbank v. Hobson, 59 Idaho 119, 80 P.2d 793 (1938); Burns v. Skogstad, 69 Idaho 227, 206 P.2d 765 (1949); Chapin v. Stewart, 71 Idaho 306, 230 P.2d 998 (1951); White v. Boydstun, 91 Idaho 615, 428 P.2d 747 (1967); Lisher v. Krasselt, 94 Idaho 513, 492 P.2d 52 (1972); Osterloh v. State, 105 Idaho 50, 665 P.2d 1060 (1983); Merrill v. Penrod, 109 Idaho 46, 704 P.2d 950 (Ct. App. 1985); Capps v. Wood, 117 Idaho 614, 790 P.2d 395 (Ct. App. 1990).

RESEARCH REFERENCES

Am. Jur. — 3 Am. Jur. 2d, Adverse Possession, §§ 298, 299.

C.J.S. — 2 C.J.S., Adverse Possession, § 265.

A.L.R. — Owner's surveying of land as entry thereon tolling running of statute of limitations for purposes of adverse possession. 76 A.L.R.3d 1202.

5-207. Possession under written claim of title. — When it appears that the occupant, or those under whom he claims, entered into the possession of the property under claim of title, exclusive of other right, founding such claim upon a written instrument, as being a conveyance of the property in question, or upon the decree or judgment of a competent court, and that there has been a continued occupation and possession of the property included in such instrument, decree or judgment, or of some part of the property under such claim, for twenty (20) years, the property so included is deemed to have been held adversely except that when it consists of a tract divided into lots, the possession of one (1) lot is not deemed a possession of any other lot of the same tract.

History.
C.C.P. 1881, § 147; R.S., R.C., & C.L., § 4040; C.S., § 6600; I.C.A., § 5-207; am. 2006, ch. 158, § 4, p. 474.

STATUTORY NOTES

Amendments.
The 2006 amendment, by ch. 158, substituted "twenty (20) years" for "five (5) years."

JUDICIAL DECISIONS

Analysis

Adverse character of possession.
Adverse possession.
Boundaries.
Deeds giving color of title.
Evidence of assessment.
Mining claim.
Payment of taxes.
Possession of cestui que trust.
Possession of part of tract.
Quiet title actions.
Railroad right-of-way.

Adverse Character of Possession.
Where record failed to indicate the trustee or the contingent remaindermen had any notice that the cestui que trust was holding adversely to their respective interests, quiet title action failed for lack of proof of occupying the land adversely for the requisite five-year period. Robertson v. Swayne, 85 Idaho 239, 378 P.2d 195 (1963) (now 20 year period, following 2006 amendment).

Adverse Possession.
Enclosure by fence of strip of land for period of 8 years established title by adverse posses-

sion, even though owner was away from vicinity for six years, since owner does not have to have notice or knowledge of adverse possession, if possession of claimant is open and notorious under claim of title. Calkins v. Kousouros, 72 Idaho 150, 237 P.2d 1053 (1951) (now 20 year period, following 2006 amendment).

Enclosure and exclusive possession of disputed land by claimant prevails, even though claimant and true owner are mistaken as to exact lines covered by their deeds. Calkins v. Kousouros, 72 Idaho 150, 237 P.2d 1053 (1951).

Party claiming title by adverse possession through enclosure of disputed property by fence does not admit title of the other by offering to buy disputed property. Calkins v. Kousouros, 72 Idaho 150, 237 P.2d 1053 (1951).

In action by plaintiffs to quiet title to house and lot in 1951, the defendants who entered into possession of property under a deed in 1933 and who remained in possession thereafter either in person or by renters were owners of property by adverse possession and color of title. Obermeyer v. Idohl, 76 Idaho 103, 278 P.2d 188 (1954).

Commencement of action by plaintiff to quiet title filed 30 days prior to end of five year period of adverse possession asserted by defendant interrupted the period of defendant's adverse possession, and the rights of the defendant as against the plaintiff must be determined as of the filing date. Smith v. Long, 76 Idaho 265, 281 P.2d 483 (1955) (now 20 year period, following 2006 amendment).

Running of the period of adverse possession was not suspended as to the interests of minors during their minority where the title of such minors was held in trust for them by a court-appointed trustee. Jones v. State, 91 Idaho 823, 432 P.2d 420 (1966).

A survey subsequent to entering into possession cannot be used as a basis for adverse possession under written claim. Standall v. Teater, 96 Idaho 152, 525 P.2d 347 (1974).

Where the evidence indicated that the adverse claimants had built a garage and placed a mobile home on the property, that their predecessor had rented trailer spaces on the land over a continuous period exceeding five years, that the claimants built a shop and that the predecessor poured gravel on the property in the trailer parking area, that the claimants' possession and improvement of the property extended over a period of approximately four years, nine months, and that their predecessor occupied or used the property for seven years, the evidence supported the trial court's findings both that the property had been "improved," and that it had been put to "the ordinary use of the occupant," as denoted in § 5-208, over a continuous period of five years. Gage v. Davis, 104 Idaho 48, 655 P.2d 942 (Ct. App. 1982) (now 20 year period, following 2006 amendment).

Nonprofit corporation which supplied water to mobile home park asserted its claim to well lots under adverse possession pursuant to a written claim and/or an oral claim of right. However, the plaintiff's use of the well lots could have been consistent with use by permission rather than adverse possession. As a result, the trial court erred in granting summary judgment for the corporation. East Lizard Butte Water Corp. v. Howell, 122 Idaho 679, 837 P.2d 805 (1992).

This section provides that a party must possess property under color of title for five years to claim title by adverse possession. Rice v. Hill City Stock Yards Co., 121 Idaho 576, 826 P.2d 1288 (1992) (now 20 year period, following 2006 amendment).

Where common driveway thirteen to twenty-one feet in width was maintained within a thirty-foot easement originally granted, improvements constructed by landowners which interfered with the thirty-foot easement were not adverse and party's right to full width of the easement had not been extinguished because a need to actually utilize the unused portion of the easement had not yet arisen; judgment in favor of party's right to full width of easement was upheld. Winn v. Eaton, 128 Idaho 670, 917 P.2d 1310 (Ct. App. 1996).

Boundaries.

Where grantor, in selling the land to the plaintiff, indicated that the fence in place was the boundary line, and nothing was said about any arrangement to change the fence, the plaintiff established title of all the land up to the fence by adverse possession. Mulder v. Stands, 71 Idaho 22, 225 P.2d 463 (1950).

Where a boundary is established by agreement, followed by acquiescence and possession, and particularly possession for the full statutory period for establishing title by prescription, the line thus established determines the location of the estate and establishes the true line or division. Mulder v. Stands, 71 Idaho 22, 225 P.2d 463 (1950) (now 20 years).

Deeds Giving Color of Title.

Where one has title to only an undivided one-half interest, he can not convey the other one-half interest; however, his deed, purporting to convey the entire property, gives color of title to the whole property to the grantee. Coe v. Sloan, 16 Idaho 49, 100 P. 354 (1909).

Even though a mayor has no authority to make a deed to a city street, still his deed gives to the grantee color of title. Boise City v. Wilkinson, 16 Idaho 150, 102 P. 148 (1909).

One who enters and occupies land, claiming title against the world, possesses adversely, even though his possession is founded in

mistake as to the validity of his deed. Bayhouse v. Urquides, 17 Idaho 286, 105 P. 1066 (1909).

A remainderman who holds adversely under a deed from the life tenant purporting to convey the absolute fee simple estate claims under color of title. Wilson v. Linder, 21 Idaho 576, 123 P. 487 (1912).

Evidence of Assessment.

Evidence by assessor that he assessed land enclosed by fence in name of claimant established payment of taxes on disputed land, even though assessor did not know for sure that land within fence was owned by claimant. Calkins v. Kousouros, 72 Idaho 150, 237 P.2d 1053 (1951).

Mining Claim.

Claimant of mining claim through adverse possession must not only show compliance with statutory provision, but must show possession of property for five consecutive years. Law v. Fowler, 45 Idaho 1, 261 P. 667 (1927) (now 20 year period, following 2006 amendment).

Payment of Taxes.

Payment of taxes is not a requirement for claiming a title under either this section or § 5-208; rather, it is a necessary element for a finding of adverse possession under oral claim of title, pursuant to § 5-209 and § 5-210. Stout v. Westover, 106 Idaho 533, 681 P.2d 1008 (1984).

Possession of Cestui Que Trust.

A cestui que trust in possession of trust realty is in law regarded as a tenant at law of the trustee, his possession being subordinate and not adverse to the trustee's legal title. In the absence of a clear and manifest hostility brought to the knowledge of the trustee and until the tenancy of the cestui is terminated, he cannot hold adversely to the trustee. Robertson v. Swayne, 85 Idaho 239, 378 P.2d 195 (1963).

Possession of Part of Tract.

Plaintiff was not in constructive possession of entire half block of land divided into separate lots through his actual possession of some of the lots. Carter v. Ruddy, 166 U.S. 493, 17 S. Ct. 640, 41 L. Ed. 1090 (1897).

Enclosure and improvement of portions of property constituting a known farm or single lot, according to the usual custom of the surrounding country, may constitute adverse possession of the whole tract. Crandall v. Goss, 30 Idaho 661, 167 P. 1025 (1917).

In an action to quiet title, evidence that the plaintiff had held the land under color of title for more than the prescriptive period justifies finding in his favor. Stickel v. Carter, 63 Idaho 78, 117 P.2d 477 (1941).

Quiet Title Actions.

A party seeking to quiet title has the burden pursuant to this section to establish the following by clear and satisfactory evidence: (1) that he entered into possession, as that term is defined by § 5-208, of the disputed property; (2) under a claim of title; (3) exclusive of other right; (4) that there has been a continued occupation and possession of the disputed property described in the decree of distribution; (5) that he has held the property for five years; and (6) that he has paid all taxes, state, county or municipal, which have been levied and assessed upon such land according to law. Pincock v. Pocatello Gold & Copper Mining Co., 100 Idaho 325, 597 P.2d 211 (1979) (now 20 year period, following 2006 amendment).

In action seeking to quiet title to property by adverse possession where no specific findings were made by the trial court as to the issue of possession under a written instrument as defined by § 5-208 or as to whether the disputed property had been possessed as defined by § 5-208 1., 2. or 3. (now (1)(a), (1)(b), or (1)(c)) and, if so, whether § 5-208 4. (now (1)(d)) would then apply whereby possession of part of a lot might conceivably entitle one to possession of the whole if all the requirements of subsection 4. ((1)(d)) had been met, remand was necessary so the trial court could make specific findings as to whether the specific necessary elements of adverse possession required by this section and § 5-208 had been proved. Owen v. Boydstun, 102 Idaho 31, 624 P.2d 413 (1981).

Railroad Right-of-Way.

Title to unused portion of right-of-way granted to railroad by act of congress can not be acquired by adverse possession while the right-of-way is being used for railroad purposes. Crandall v. Goss, 30 Idaho 661, 167 P. 1025 (1917).

Cited in: Hodges v. Lemp, 24 Idaho 399, 135 P. 250 (1913); Smith v. Yates, 25 Idaho 137, 136 P. 622 (1913); Lavin v. Panhandle Lumber Co., 51 Idaho 1, 1 P.2d 186 (1932); Woll v. Costella, 59 Idaho 569, 85 P.2d 679 (1938); Chapin v. Stewart, 71 Idaho 306, 230 P.2d 998 (1951).

RESEARCH REFERENCES

Am. Jur. — 3 Am. Jur. 2d, Adverse Possession, §§ 129 to 160.

C.J.S. — 2 C.J.S., Adverse Possession, §§ 90 to 105.

5-208. Claim under written instrument — Possession defined. — (1) Except as provided in subsection (2) of this section, for the purpose of constituting an adverse possession by a person claiming a title founded upon a written instrument, or a judgment or decree, land is deemed to have been possessed and occupied in the following cases:

(a) Where it has been usually cultivated or improved.

(b) Where it has been protected by a substantial enclosure.

(c) Where, although not enclosed, it has been used for the supply of fuel, or of fencing timber for the purposes of husbandry, or for pasturage, or for the ordinary use of the occupant.

(d) Where a known farm or single lot has been partly improved, the portion of such farm or lot that may have been left not cleared, or not enclosed, according to the usual course and custom of the adjoining country, shall be deemed to have been occupied for the same length of time as the part improved and cultivated.

(2) Notwithstanding the provisions of subsection (1) of this section, adverse possession shall not be considered established under the provisions of any sections of this code if a written instrument has been recorded in the real estate records kept by the county recorder of the county in which the property is located and such written instrument declares that it was not the intent of a party to such instrument, by permitting possession or occupation of real property as set forth in subsection (1) of this section, to thereby define property boundaries or ownership.

(3) For purposes of establishing adverse possession pursuant to this section, a person claiming adverse possession must present clear and convincing evidence that the requirements of subsections (1) or (2) of this section have been met.

History.
C.C.P. 1881, § 148; R.S., R.C., & C.L., § 4041; C.S., § 6601; I.C.A., § 5-208; am. 2001, ch. 290, § 1, p. 1027.

JUDICIAL DECISIONS

Analysis

Actual Notice Not Sufficient.

Actual notice to owner that another claims adversely to him, even when continued for five years, does not dispense with necessity of requirement of actual and continued possession and occupation. Pleasants v. Henry, 36 Idaho 728, 213 P. 565 (1923) (now 20 year requirement).

Burden of Proof.

A party claiming title to property by adverse possession has the burden of proving all the elements by clear and satisfactory evidence. Rice v. Hill City Stock Yards Co., 121 Idaho 576, 826 P.2d 1288 (1992).

Claim Founded upon a Written Instrument.

Plaintiff's claim to disputed triangular area west of fence separating defendant's property from hers was not "founded upon a written instrument" within the meaning of this section because no written instrument purported to give her actual title to or color of title to the disputed strip. Persyn v. Favreau, 119 Idaho 154, 804 P.2d 327 (Ct. App. 1990).

Where the plaintiff's possession of property was shown by leases over three decades which expressly allowed the lessees to use river property, the evidence was sufficient for the trial court to find that plaintiff had continuously exercised control over that river property in its entirety for over fifty years. DeChambeau v. Estate of Smith, 132 Idaho 568, 976 P.2d 922 (1999).

Claim of Minors.

Where co-tenant acquired real estate from other tenants after closing of estate, claim of minor heirs of one of the tenants to real estate was barred where claim was not asserted until 22 years after youngest minor reached majority. Chapin v. Stewart, 71 Idaho 306, 230 P.2d 998 (1951).

Running of the period of adverse possession was not suspended as to the interests of minors during their minority where the title of such minors was held in trust for them by a court-appointed trustee. Jones v. State, 91 Idaho 823, 432 P.2d 420 (1967).

Easements.

Where common driveway thirteen to twenty-one feet in width was maintained within a thirty-foot easement originally granted, improvements constructed by landowners which interfered with the thirty-foot easement were not adverse and party's right to full width of the easement had not been extinguished because a need to actually utilize the unused portion of the easement had not yet arisen; judgment in favor of party's right to full width of easement was upheld. Winn v. Eaton, 128 Idaho 670, 917 P.2d 1310 (Ct. App. 1996).

Enclosure.

Party claiming title by adverse possession through enclosure of disputed property by fence does not admit title of the other by offering to buy disputed property. Calkins v. Kousouros, 72 Idaho 150, 237 P.2d 1053 (1952).

Enclosure by fence of strip of land for period of eight years established title by adverse possession, even though owner was away from vicinity for six years, since owner does not have to have notice or knowledge of adverse possession, if possession of claimant is open and notorious under claim of title. Calkins v. Kousouros, 72 Idaho 150, 237 P.2d 1053 (1952) (now 20 year period, following 2006 amendment).

Enclosure and exclusive possession of disputed land by claimant prevails, even though claimant and true owner are mistaken as to exact lines covered by their deeds. Calkins v. Kousouros, 72 Idaho 150, 237 P.2d 1053 (1952).

A barbed wire fence which was shown to be no longer up was insufficient as a "substantial enclosure." Standall v. Teater, 96 Idaho 152, 525 P.2d 347 (1974).

A fence erected by a neighbor for the purpose of containing livestock or to prevent livestock from entering the neighbor's property will not suffice to satisfy the enclosure requirement for adverse possession by a claimant adjacent to the neighbor's property. Capps v. Wood, 117 Idaho 614, 790 P.2d 395 (Ct. App. 1990).

Evidence of Assessment.

Evidence by assessor that he assessed land enclosed by fence in name of claimant established payment of taxes on disputed land, even though assessor did not know for sure that land within fence was owned by claimant. Calkins v. Kousouros, 72 Idaho 150, 237 P.2d 1053 (1952).

Evidence of Improvement.

Where the evidence indicated that the adverse claimants had built a garage and placed a mobile home on the property, that their predecessor had rented trailer spaces on the land over a continuous period exceeding five years, that the claimants built a shop and that the predecessor poured gravel on the property in the trailer parking area, that the claimants' possession and improvement of the property extended over a period of approximately four years, nine months, and that their predecessor occupied or used the property for seven years, the evidence supported the trial court's findings both that the property had been "improved," and that it had been "put to the ordinary use of the occupant," as denoted in this section, over a continuous period of five years. Gage v. Davis, 104 Idaho 48, 655 P.2d 942 (Ct. App. 1982) (now 20 year period, following 2006 amendment).

Findings of Court.

In action seeking to quiet title to property by adverse possession where no specific findings were made by the trial court as to the issue of possession under a written instrument as defined by this section or as to whether the disputed property had been pos-

sessed as defined by paragraph (1)(a), (1)(b), or (1)(c) of this section, and, if so, whether paragraph (1)(d) of this section would then apply whereby possession of part of a lot might conceivably entitle one to possession of the whole if all the requirements of the subsection had been met, remand was necessary so the trial court could make specific findings as to whether the specific necessary elements of adverse possession required by § 5-207 and this section had been proved. Owen v. Boydstun, 102 Idaho 31, 624 P.2d 413 (1981).

Need to Use.

Where an easement has been created, but no occasion has arisen for its use, the owner of the servient tenement may plant trees, erect a fence, etc., and such use will not be deemed to be adverse, until the need to use the easement arises. Kolouch v. Kramer, 120 Idaho 65, 813 P.2d 876 (1991).

Payment of Taxes.

Payment of taxes is not a requirement for claiming a title under either § 5-207 or this section; rather, it is a necessary element for a finding of adverse possession under oral claim of title, pursuant to § 5-209 and § 5-210. Stout v. Westover, 106 Idaho 533, 681 P.2d 1008 (1984).

Permissive or Statutory Use.

A prescriptive right to the use of water cannot be acquired by the use thereof with the consent of the owner, nor where he is required by statute to let others use it. Hall v. Blackman, 8 Idaho 272, 68 P. 19 (1902).

Nonprofit corporation which supplied water to mobile home park asserted its claim to well lots under adverse possession pursuant to a written claim and/or an oral claim of right. However, the plaintiff's use of the well lots could have been consistent with use by permission rather than adverse possession. As a result, the trial court erred in granting summary judgment for the corporation. East Lizard Butte Water Corp. v. Howell, 122 Idaho 679, 837 P.2d 805 (1992).

Cited in: Coe v. Sloan, 16 Idaho 49, 100 P. 354 (1909); Smith v. Yates, 25 Idaho 137, 136 P. 622 (1913); Johnson v. Sowden, 25 Idaho 227, 136 P. 1136 (1913); Crandall v. Goss, 30 Idaho 661, 167 P. 1025 (1917); Pincock v. Pocatello Gold & Copper Mining Co., 107 Idaho 683, 691 P.2d 1298 (Ct. App. 1984).

RESEARCH REFERENCES

Am. Jur. — 3 Am. Jur. 2d, Adverse Possession, §§ 143 to 169.

C.J.S. — 2 C.J.S., Adverse Possession, §§ 88 to 105.

5-209. Possession under oral claim of title. — Where it appears that there has been an actual continued occupation of land, under a claim of title, exclusive of any other right, but not founded upon a written instrument, judgment or decree, the land so actually occupied, and no other, is deemed to have been held adversely.

History.

C.C.P., 1881, § 149; R.S., R.C., & C.L., § 4042; C.S., § 6602; I.C.A., § 5-209.

JUDICIAL DECISIONS

ANALYSIS

Adverse possession.
Boundary agreement.
Burden of proof.
Easements.
Enclosure.
Evidence.
Hostile intent.
Leased property.
Payment of taxes.
Presumption of permissive occupation.
Running of statute against state.

Adverse Possession.

Party claiming title by adverse possession through enclosure of disputed property by fence does not admit title of the other by offering to buy disputed property. Calkins v. Kousouros, 72 Idaho 150, 237 P.2d 1053 (1951).

Claim of adverse possession to strip of land based solely on addition to building constructed by claimant applied only to that portion of the strip of land on which the addition stood and did not apply to balance of the strip of land. Hogan v. Blakney, 73 Idaho 274, 251 P.2d 209 (1952).

Adverse possession to real estate can only be sustained by proof of uninterrupted and continuous use for the entire prescriptive period. Hogan v. Blakney, 73 Idaho 274, 251 P.2d 209 (1952).

Possession of enclosed disputed area by defendant's predecessors in title for a period of 40 years by virtue of cultivation of crops constituted adverse possession. Beneficial Life Ins. Co. v. Wakamatsu, 75 Idaho 232, 270 P.2d 830 (1954).

Respondent's uninterrupted and continuous use of the East Ditch for more than the prescriptive period raises the presumption that his use was adverse and under a claim of right and there was no evidence to overcome this presumption; therefore, respondent acquired and was the owner of an easement or right of way for the flow of his full head of 60 miners inches of water in and through the East Ditch, even though his 80 shares of stock in the canal company evidenced a water right appurtenant to his land of 50 miners inches of water. Ramseyer v. Jamerson, 78 Idaho 504, 305 P.2d 1088 (1957).

In general, a party asserting adverse possession under an oral claim of title must prove by clear and satisfactory evidence that he or she has been in possession of the property for the prescriptive period, and that the possession has been actual, open, visible, notorious, continuous, and hostile to the party against whom the claim of adverse possession is made. Shelton v. Boydstun Beach Ass'n, 102 Idaho 818, 641 P.2d 1005 (Ct. App. 1982).

When applied to extinguishment of an easement, the elements of exclusivity and hostility require that the land owner use the property within the easement in a manner wholly inconsistent with enjoyment of the easement. Shelton v. Boydstun Beach Ass'n, 102 Idaho 818, 641 P.2d 1005 (Ct. App. 1982).

Where the evidence showed that the owners of the servient beach premises constructed retaining wall, erected fences around their property, and planted grass and flowers within the easement, the trial court's finding that the improvements by the servient owners were inconsistent with the express purposes of boating, bathing, driving and parking set forth in the grant of easement was supported by substantial and competent evidence and, thus, permitted the court's judgment extinguishing that portion of the easement which had been enclosed and improved. Shelton v. Boydstun Beach Ass'n, 102 Idaho 818, 641 P.2d 1005 (Ct. App. 1982).

Nonprofit corporation which supplied water to mobile home park asserted its claim to well lots under adverse possession pursuant to a written claim and/or an oral claim of right. However, the plaintiff's use of the well lots could have been consistent with use by permission rather than adverse possession. As a result, the trial court erred in granting summary judgment for the corporation. East Lizard Butte Water Corp. v. Howell, 122 Idaho 679, 837 P.2d 805 (1992).

Claimant's argument that he need only establish adverse possession as against original owner of land in his quiet title action was wholly without merit because action was also filed against "all unknown claimants" and county was an unknown claimant and ownership must, therefore, be proven against the county as against original owner. Cluff v. Bonner County, 126 Idaho 950, 895 P.2d 551 (1995).

Although there was evidence to the contrary, where the district judge was in the best position to determine the credibility of witnesses whose evidence demonstrated a shared maintenance of property, the finding that adverse possession by the plaintiffs was not established was affirmed. Carney v. Heinson, 133 Idaho 275, 985 P.2d 1137 (1999).

Boundary Agreement.

In an action to have title quieted in the plaintiffs and to have a fence located between the parties' respective residences declared the boundary line, where location of the true boundary was known and where an oral agreement to fix another line as the boundary established only a right of permissive use in the plaintiffs, plaintiffs' actions of erecting a fence and maintaining and cultivating the lawn, which did not constitute notice of hostile possession since done with the owner's consent, were insufficient to commence running of the statute of limitations and to establish title through adverse possession. Gameson v. Remer, 96 Idaho 789, 537 P.2d 631 (1975).

Burden of Proof.

The burden of showing all of the essential elements of adverse possession is upon the party seeking title thereunder and such claimant must prove every element of adverse possession by clear and satisfactory evidence. Berg v. Fairman, 107 Idaho 441, 690 P.2d 896 (1984).

Easements.

Where a purchaser of a right-of-way for a ditch across a tract of land has failed to record

its conveyance prior to the record of a subsequent conveyance made in good faith, and in an action to quiet title seeks to recover on the grounds of adverse possession for the statutory period, the extent of the right-of-way or easement must be determined by the facts proven as to the extent of the use and occupation, and can not be determined by the calls of such unrecorded deed. Swank v. Sweetwater Irrigation & Power Co., 15 Idaho 353, 98 P. 297 (1908).

One who has acquired right of way for canal across land of another by adverse user has also acquired right of entry to clean and maintain canal. Gorrie v. Weiser Irrigation Dist., 28 Idaho 248, 153 P. 561 (1915).

Where common driveway thirteen to twenty-one feet in width was maintained within a thirty-foot easement originally granted, improvements constructed by landowners which interfered with the thirty-foot easement were not adverse and party's right to full width of the easement had not been extinguished because a need to actually utilize the unused portion of the easement had not yet arisen; judgment in favor of party's right to full width of easement was upheld. Winn v. Eaton, 128 Idaho 670, 917 P.2d 1310 (Ct. App. 1996).

Enclosure.

Enclosure and exclusive possession of disputed land by claimant prevails, even though claimant and true owner are mistaken as to exact lines covered by their deeds. Calkins v. Kousouros, 72 Idaho 150, 237 P.2d 1053 (1951).

Enclosure by fence of strip of land for period of eight years established title by adverse possession, even though owner was away from vicinity for six years, since owner does not have to have notice or knowledge of adverse possession, if possession of claimant is open and notorious under claim of title. Calkins v. Kousouros, 72 Idaho 150, 237 P.2d 1053 (1951) (now 20 year requirement).

Fact that respondents and their predecessors possessed the disputed property by enclosure, exclusive use and payment of taxes constituted adverse possession, although the possession, was authorized by oral agreement. Lisher v. Krasselt, 94 Idaho 513, 492 P.2d 52 (1972).

Evidence.

Evidence by assessor that he assessed land enclosed by fence in name of claimant established payment of taxes on disputed land, even though assessor did not know for sure that land within fence was owned by claimant. Calkins v. Kousouros, 72 Idaho 150, 237 P.2d 1053 (1951).

Finding of trial court that claimant of strip of land by adverse possession had paid all taxes levied and assessed against land was technically incorrect where evidence showed that no taxes were ever levied against the land, but finding was sufficient to cover favorable finding on matter of taxes in favor of claimant. Hogan v. Blakney, 73 Idaho 274, 251 P.2d 209 (1952).

Finding of trial court that possession of party claiming title to strip of land by adverse possession was adverse and hostile was not overcome by evidence that claimant had made some inquiry as to ownership of disputed land at office of assessor. Hogan v. Blakney, 73 Idaho 274, 251 P.2d 209 (1952).

Evidence that a driveway was used uninterruptedly and continuously for more than the prescriptive period, would raise a presumption that such use was adverse and under claim of right, especially since there was not sufficient evidence to overcome such presumption; in fact, evidence being given of improvements to the driveway being made, it being surfaced with concrete, which would support the contention that the use was not merely permissive. Sinnett v. Werelus, 83 Idaho 514, 365 P.2d 952 (1961).

Hostile Intent.

Person claiming title to property by adverse possession has the burden of showing that the possession of disputed property was hostile to that of the real owner, and not with the permission of the real owner since occupation without hostile intent does not constitute adverse possession; if the initial entry of the adverse claimant upon the disputed land was with the permission of the record owner, the statute of limitation will not begin to run against the true owner until the adverse claimant establishes exclusive right in himself; and once it has been established that an adverse claimant's initial entry upon disputed land was with the permission of the record owner, only an unequivocal act by the permissive user brought home to the true owner will start the running of the statute of limitations. Berg v. Fairman, 107 Idaho 441, 690 P.2d 896 (1984).

Where adverse claimant's predecessors in title to the disputed part of lot were her mother and father and her brother, she was faced with the presumption that their occupation was permissive since they were blood relatives; thus, in action to quiet title in part of lot some unequivocal act indicating occupier's intent to claim adversely had to be shown to change the character of the use from permissive to adverse. Berg v. Fairman, 107 Idaho 441, 690 P.2d 896 (1984).

Leased Property.

In an action to quiet title based on adverse possession, if those who caused warehouse to be located on the land believed that it was standing on leased property, the act of plaintiff's predecessors in interest in occupying the land was not an assertion of title in them-

selves so as to support a claim for adverse possession. Swanson v. State, 83 Idaho 126, 358 P.2d 387 (1960).

Payment of Taxes.

Payment of taxes is not a requirement for claiming a title under either § 5-207 or § 5-208; rather, it is a necessary element for a finding of adverse possession under oral claim of title pursuant to this section and § 5-210. Stout v. Westover, 106 Idaho 533, 681 P.2d 1008 (1984).

Presumption of Permissive Occupation.

When one occupies the land of a blood relative, such occupation is presumptively with the permission of the true owner. Berg v. Fairman, 107 Idaho 441, 690 P.2d 896 (1984).

Where claimant's predecessors in title to disputed land were blood relatives she was faced with a presumption of law that the occupation of the disputed strip was permissive and, therefore, it was incumbent upon her to, by affidavit or otherwise, oppose the motion for summary judgment setting forth specific facts that would controvert the presumption of permissive occupation; where the record was devoid of any specific facts controverting the presumption, summary judgment in action to quiet title was proper. Berg v. Fairman, 107 Idaho 441, 690 P.2d 896 (1984).

Running of Statute against State.

The statute begins to run against a grantee of the state only from the time when he acquires title, and any occupancy prior to that time will not be deemed adverse and can not be the basis of title by adverse possession. Hellerud v. Hauck, 52 Idaho 226, 13 P.2d 1099 (1932).

Cited in: Idaho Land Co. v. Parsons, 3 Idaho 450, 31 P. 791 (1892); Coe v. Sloan, 16 Idaho 49, 100 P. 354 (1909); Johnson v. Sowden, 25 Idaho 227, 136 P. 1136 (1913); Crandall v. Goss, 30 Idaho 661, 167 P. 1025 (1917); Bower v. Kollmeyer, 31 Idaho 712, 175 P. 964 (1918); Lavin v. Panhandle Lumber Co., 51 Idaho 1, 1 P.2d 186 (1931); Snyder v. Blake, 69 Idaho 14, 202 P.2d 394 (1949); White v. Boydstun, 91 Idaho 615, 428 P.2d 747 (1967); Scott v. Gubler, 95 Idaho 441, 511 P.2d 258 (1973); Owen v. Boydstun, 102 Idaho 31, 624 P.2d 413 (1981); Norwood v. Stevens, 104 Idaho 44, 655 P.2d 938 (Ct. App. 1982); Wilson v. Gladish, 140 Idaho 861, 103 P.3d 474 (Ct. App. 2004).

RESEARCH REFERENCES

Am. Jur. — 3 Am. Jur. 2d, Adverse Possession, §§ 134 to 139.

C.J.S. — 2 C.J.S., Adverse Possession, §§ 226 to 243.

5-210. Oral claim — Possession defined — Payment of taxes. — For the purpose of constituting an adverse possession, by a person claiming title not founded upon a written instrument, judgment or decree, land is deemed to have been possessed and occupied in the following cases only:

(1) Where it has been protected by a substantial enclosure.

(2) Where it has been usually cultivated or improved.

Provided, however, that in no case shall adverse possession be considered established under the provisions of any sections of this code unless it shall be shown that the land has been occupied and claimed for the period of twenty (20) years continuously, and the party or persons, their predecessors and grantors, have paid all the taxes, state, county or municipal, which have been levied and assessed upon such land according to law. Provided further, that adverse possession shall not be considered established under the provisions of any sections of this code if a written instrument has been recorded in the real estate records kept by the county recorder of the county in which the property is located and such written instrument declares that it was not the intent of a party to such instrument, by permitting possession or occupation of real property, to thereby define property boundaries or ownership. Provided further, that for purposes of establishing adverse possession pursuant to this section, a person claiming adverse possession must present clear and convincing evidence that the requirements of subsection (1) or (2) of this section have been met.

History.

C.C.P. 1881, § 150; R.S., R.C., & C.L., § 4043; C.S., § 6603; I.C.A., § 5-210; am. 2001, ch. 290, § 2, p. 1027; am. 2006, ch. 158, § 5, p. 474.

STATUTORY NOTES

Amendments.

The 2006 amendment, by ch. 158, substituted "twenty (20) years" for "five (5) years" in the last paragraph.

Effective Dates.

Section 3 of S.L. 2001, ch. 290 declared an emergency retroactively to January 1, 2001 and approved April 2, 2001.

JUDICIAL DECISIONS

Analysis

Acts Constituting Possession.

Evidence that disputed property had been occupied and claimed by respondent for over five years, had been protected by a substantial enclosure maintained by the respondent, had been farmed, leased or otherwise used by the respondent, and that respondent had agreed with deed holder to the other part of the land that a certain part of Trestle Creek should form the boundary line between the respective properties satisfied the statutory requirements set out in this section. Eagan v. Colwell, 86 Idaho 525, 388 P.2d 999 (1964) (now 20 year requirement).

Evidence that owners of land adjoining that in dispute and their predecessors in interest had built and maintained a fence enclosing both tracts since thirty years prior to the deed from said predecessors to the present owners, that both tracts, when assessed, were assessed to said parties, that all taxes paid during said period had been paid by said parties, and that both tracts had been generally regarded by nearby residents as one tract and known by the name of said predecessors, although disputed in part, was sufficient to sustain a decree quieting title in said owners as against the holders of title by an unbroken chain of conveyances beginning with the grantee of the original patent, which holders of title had never been in possession. White v. Boydstun, 91 Idaho 615, 428 P.2d 747 (1967).

Adverse Possession.

Where one claims title to property by adverse possession, it is not necessary that the five years' continuous, exclusive adverse possession and payment of taxes should have been immediately preceding the commencement of the action or at any special or particular time, but it is sufficient if the party claiming such title can establish any continuous five-year period subsequent to the acquisition of the legal title by the adverse party during which he has complied with the statute in maintaining his open, notorious, continuous adverse possession and payment of taxes for such period. Cramer v. Walker, 23 Idaho 495, 130 P. 1002 (1913) (now 20 year requirement).

Mere intention to occupy land, however openly proclaimed, is not possession; intention must be carried into actual execution.

Pleasants v. Henry, 36 Idaho 728, 213 P. 565 (1923).

Open and notorious occupation with hostile intent is necessary constituent of adverse possession and neither hostile intent without such occupation, nor such occupation without hostile intent, is sufficient. Pleasants v. Henry, 36 Idaho 728, 213 P. 565 (1923).

Party claiming title by adverse possession through enclosure of disputed property by fence does not admit title of the other by offering to buy disputed property. Calkins v. Kousouros, 72 Idaho 150, 237 P.2d 1053 (1951).

Enclosure by fence of strip of land for period of 8 years established title by adverse possession, even though owner was away from vicinity for six years, since owner does not have to have notice or knowledge of adverse possession, if possession of claimant is open and notorious under claim of title. Calkins v. Kousouros, 72 Idaho 150, 237 P.2d 1053 (1951) (now 20 year requirement).

Finding of trial court that possession of party claiming title to strip of land by adverse possession was adverse and hostile was not overcome by evidence that claimant had made some inquiry as to ownership of disputed land at office of assessor. Hogan v. Blakney, 73 Idaho 274, 251 P.2d 209 (1952).

Adverse possession to real estate can only be sustained by proof of uninterrupted and continuous use for the entire prescriptive period. Hogan v. Blakney, 73 Idaho 274, 251 P.2d 209 (1952).

Claim of adverse possession to strip of land based solely on addition to building constructed by claimant applied only to that portion of the strip of land on which the addition stood and did not apply to balance of the strip of land. Hogan v. Blakney, 73 Idaho 274, 251 P.2d 209 (1952).

Commencement of action by plaintiff to quiet title filed 30 days prior to end of five year period of adverse possession asserted by defendant interrupted the period of defendant's adverse possession, and the rights of the defendant as against the plaintiff must be determined as of the filing date. Smith v. Long, 76 Idaho 265, 281 P.2d 483 (1955) (now 20 year requirement).

Where there is no proof showing that actual occupation was accompanied by a claim or an intention inconsistent with the title of the owner, an adverse claim based on such occupation cannot be allowed. Swanson v. State, 83 Idaho 126, 358 P.2d 387 (1960).

Under the provisions of this section, protection by substantial enclosure and payment of the taxes are essential to the successful assertion of title to land by adverse possession; however, these requirements do not apply to an easement which is merely appurtenant to the dominant estate and is not taxable separate and apart from it. Sinnett v. Werelus, 83 Idaho 514, 365 P.2d 952 (1961).

Fact that respondents and their predecessors possessed the disputed property by enclosure, exclusive use and payment of taxes constituted adverse possession, although the possession was authorized by oral agreement. Lisher v. Krasselt, 94 Idaho 513, 492 P.2d 52 (1974).

Where defendants maintained substantial enclosure around the land claimed by them by adverse possession, but were assessed only on their land and the land was not described by metes and bounds, and where they paid all taxes assessed to them over the years, they met the requirement of payment of taxes precedent to adverse possession claim. Standall v. Teater, 96 Idaho 152, 525 P.2d 347 (1974).

In a suit based on adverse possession under this section, where two property owners owned land on the opposite sides of the Boise River, which gradually changed its course northward, and the southerly land-owners fenced the land up to the northerly channel for 40 to 45 years, and where taxes had been paid on both lots by lot number rather than by acreage, the southerly owners had established their claim, to the land between the two channels, by adverse possession but not by accretion. Nesbitt v. Wolfkiel, 100 Idaho 396, 598 P.2d 1046 (1979).

Where brothers used acre of land as horse breeding business following father's death in 1962, paid taxes on it and three witnesses testified that they believed brothers were owners of the property, the manner of occupation did not sufficiently "bring home" to sisters, who claimed ownership through inheritance and quitclaim deeds obtained from other relatives, that brothers were claiming ownership through adverse possession, since knowledge of occupation is not knowledge of adverse possession. Tremayne v. Taylor, 101 Idaho 792, 621 P.2d 408 (1980).

In general, a party asserting adverse possession under an oral claim of title must prove by clear and satisfactory evidence that he or she has been in possession of the property for at least five years, and that the possession has been actual, open, visible, notorious, continuous, and hostile to the party against whom the claim of adverse possession is made. Shelton v. Boydstun Beach Ass'n, 102 Idaho 818, 641 P.2d 1005 (Ct. App. 1982) (now 20 year requirement).

When applied to extinguishment of an easement, the elements of exclusivity and hostility require that the land owner use the property within the easement in a manner wholly inconsistent with enjoyment of the easement. Shelton v. Boydstun Beach Ass'n, 102 Idaho 818, 641 P.2d 1005 (Ct. App. 1982).

Where a deputy county assessor testified

that taxes on a disputed strip were not assessed to the party seeking adverse possession, rather, the taxes were assessed to the owners of the adjacent property and their predecessors-in-interest, there was no evidence in the record from which the trial court could have found that the party seeking adverse possession actually paid taxes assessed against the disputed property and adverse possession is not available to the party seeking adverse possession. Herrmann v. Woodell, 107 Idaho 916, 693 P.2d 1118 (Ct. App. 1985).

Nonprofit corporation which supplied water to mobile home park asserted its claim to well lots under adverse possession pursuant to a written claim and/or an oral claim of right. However, the plaintiff's use of the well lots could have been consistent with use by permission rather than adverse possession. As a result, the trial court erred in granting summary judgment for the corporation. East Lizard Butte Water Corp. v. Howell, 122 Idaho 679, 837 P.2d 805 (1992).

Claimant's argument that he need only establish adverse possession as against original owner of land in his quiet title action was wholly without merit because action was also filed against "all unknown claimants" and county was an unknown claimant and ownership must therefore be proven against the county as against original owner. Cluff v. Bonner County, 126 Idaho 950, 895 P.2d 551 (1995).

Although there was evidence to the contrary, where the district judge was in the best position to determine the credibility of witnesses whose evidence demonstrated a shared maintenance of property, the finding that adverse possession by the plaintiffs was not established was affirmed. Carney v. Heinson, 133 Idaho 275, 985 P.2d 1137 (1999).

Claimant could not succeed on her adverse possession claim because she presented no evidence that she ever paid property taxes on disputed parcel of land, and, without such evidence, the district court correctly concluded that the claimant had failed to meet the tax payment requirement. Luce v. Marble, 142 Idaho 264, 127 P.3d 167 (2005).

Boundaries.

Where one enters into the possession of a tract of land and maintains a fence, and occupies and uses the land up to the fence for a period of 40 years, with the knowledge and acquiescence of the successive owner of the adjoining land, such occupancy will amount to adverse possession, even though the division fence was erected through mistake as to the true boundary line. Bayhouse v. Urquides, 17 Idaho 286, 105 P. 1066 (1909).

Where a row of trees has constituted a monument between lots of coterminous owners for more than five years, same established true boundary line. Boise Valley Constr. Co. v. Kroeger, 17 Idaho 384, 105 P. 1070 (1909) (now 20 year requirement).

Acquiescence in the maintenance of a line fence for a great length of time may be presumptive evidence of an agreement as to a boundary line, but is not conclusive evidence and will not overcome a positive agreement or understanding that after the true line is established the fence will be made to conform to it. Brown v. Brown, 18 Idaho 345, 110 P. 269 (1910).

Where a fence constitutes a monument between tracts of conterminous owners and such monument establishes the boundary line between the adjoining premises, the requirement of this section as to payment of taxes is satisfied by such payment on the lot within which the disputed tract is enclosed. Mulder v. Stands, 71 Idaho 22, 225 P.2d 463 (1950).

Enclosure and exclusive possession of disputed land by claimant prevails, even though claimant and true owner are mistaken as to exact lines covered by their deeds. Calkins v. Kousouros, 72 Idaho 150, 237 P.2d 1053 (1951).

Where parties for period in excess of statutory time recognized and agreed upon location of boundary line, as defined by erection of fence, a true line was established. Edgeller v. Johnston, 74 Idaho 359, 262 P.2d 1006 (1953).

Evidence was sufficient to establish fence as boundary between adjoining landowners that plaintiffs' title was not founded upon a written instrument, judgment or decree and that the disputed area had not been protected by a substantial enclosure by plaintiffs or their predecessors. Larson v. Lindsay, 80 Idaho 242, 327 P.2d 775 (1958).

In an action to have title quieted in the plaintiffs and to have a fence located between the parties' respective residences declared the boundary line, where location of the true boundary was known to the parties and where an oral agreement to fix another line as the boundary established only a right of permissive use in the plaintiffs, plaintiffs' actions of erecting a fence and maintaining and cultivating the lawn, which did not constitute notice of hostile possession since done with the owner's consent, were insufficient to commence running of the statute of limitations and to establish title through adverse possession. Gameson v. Remer, 96 Idaho 789, 537 P.2d 631 (1975).

Burden of Proof.

Burden of proving all essential elements of adverse possession is upon party relying upon that title. Pleasants v. Henry, 36 Idaho 728, 213 P. 565 (1923).

Plaintiff in quiet title proceeding, who does not claim under judgment, decree, or written instrument, is only required to prove protec-

tion of land by a substantial enclosure or cultivation or improvement of land. Edgeller v. Johnston, 74 Idaho 359, 262 P.2d 1006 (1953).

The requirement of this section that land alleged to be adversely possessed be either protected by a substantial enclosure or have been usually cultivated or improved is written in the disjunctive and, thus, plaintiffs need prove only either element. Owen v. Boydstun, 102 Idaho 31, 624 P.2d 413 (1981).

The burden of showing all of the essential elements of adverse possession is upon the party seeking title thereunder, and such claimant must prove every element of adverse possession by clear and satisfactory evidence. Berg v. Fairman, 107 Idaho 441, 690 P.2d 896 (1984).

Delineation of Boundaries.

A natural boundary can mark the confines of property adversely possessed. Lindgren v. Martin, 130 Idaho 854, 949 P.2d 1061 (1997).

Essential Elements.

—Enclosure.

An essential element of adverse possession is that land claimed be protected by a substantial enclosure. Smylie v. Pearsall, 93 Idaho 188, 457 P.2d 427 (1969).

The requirement that the property being adversely claimed be usually cultivated or improved was satisfied by adverse claimant's improving the property by planting hedgerows, flower gardens, shrubs and trees along the purported boundary line. Hyde v. Lawson, 94 Idaho 886, 499 P.2d 1242 (1972), overruled on other grounds, Nesbitt v. Wolfkiel, 100 Idaho 396, 598 P.2d 1046 (1979).

The maintenance by plaintiff for a period of five years of flowers, trees and shrubs along the purported boundary line and a hedgerow along a portion thereof satisfied the enclosure requirement imposed by this section, because the boundaries of the plaintiff's adverse occupancy were clearly indicated. Hyde v. Lawson, 94 Idaho 886, 499 P.2d 1242 (1972), overruled on other grounds, Nesbitt v. Wolfkiel, 100 Idaho 396, 598 P.2d 1046 (1979) (now 20 year requirement).

Chain link fence is a "substantial enclosure." Standall v. Teater, 96 Idaho 152, 525 P.2d 347 (1974).

A barbed wire fence which was shown to be no longer up was insufficient as a "substantial enclosure." Standall v. Teater, 96 Idaho 152, 525 P.2d 347 (1974).

The construction of a substantial enclosure to protect property claimed under adverse possession by those asserting possession is an element of adverse possession which must be clearly and satisfactorily proven. Loomis v. Union P.R.R., 97 Idaho 341, 544 P.2d 299 (1975).

A fence erected by a neighbor for the purpose of containing livestock or to prevent livestock from entering the neighbor's property will not suffice to satisfy the enclosure requirement for adverse possession by a claimant adjacent to the neighbor's property. Capps v. Wood, 117 Idaho 614, 790 P.2d 395 (Ct. App. 1990).

A fence did not constitute a substantial enclosure under subdivision (1) of this section where the fence had not been erected by plaintiff or plaintiff's grantors and where its purpose never was to enclose any part of plaintiff's property. Persyn v. Favreau, 119 Idaho 154, 804 P.2d 327 (Ct. App. 1990).

Evidence.

One asserting adverse possession as against the owner of real estate must prove each and every element of adverse possession by clear and satisfactory evidence. Swanson v. State, 83 Idaho 126, 358 P.2d 387 (1960); Loomis v. Union P.R.R., 97 Idaho 341, 544 P.2d 299 (1975).

In action to quiet title to a strip of land based on adverse possession where evidence did not show that land had been protected by substantial enclosure or had been cultivated or improved by appellants or their predecessors in interest, such action must fail. Swanson v. State, 83 Idaho 126, 358 P.2d 387 (1960).

Where the owner of a lot conveyed to plaintiff's grantor the westerly 100 feet of the lot and subsequently conveyed all of said lot "except the westerly 100 ft. thereof" to defendant and the parties paid taxes on their respective tracts according to such descriptions, adverse possession of land between the boundary between the two tracts and a fence some distance to the west of the true boundary was not established in defendant. Fry v. Smith, 91 Idaho 740, 430 P.2d 486 (1967).

Inasmuch as adverse possession must be established by clear and satisfactory evidence, plaintiffs who sought to quiet title to property on basis of adverse possession had not established the requisite hostile possession in light of defendants' evidence of an oral lease agreement. Aldape v. State, 98 Idaho 912, 575 P.2d 891 (1978).

Where plaintiffs in action to quiet title had used strip of land between their deeded property and lake to gain access to lake, had cleared brush and rocks from the strip, had hauled sand to the beach area and built a simple firepit on the strip, and had constructed a rail fence extending onto the strip to within 12 feet of the high-water line of the lake, the trial court's finding that neither the improvements made nor the artificial or natural boundaries surrounding the strip sufficiently delineated the area adversely occupied to establish improvements or enclosure as

required by this section was not clearly erroneous. Owen v. Boydstun, 102 Idaho 31, 624 P.2d 413 (1981).

Where the evidence showed that the owners of the servient beach premises constructed retaining wall, erected fences around their property and planted grass and flowers within the easement, the trial court's finding that the improvements by the servient owners were inconsistent with the express purposes of boating, bathing, driving and parking set forth in the grant of easement was supported by substantial and competent evidence and, thus, permitted the court's judgment extinguishing that portion of the easement which had been enclosed and improved. Shelton v. Boydstun Beach Ass'n, 102 Idaho 818, 641 P.2d 1005 (Ct. App. 1982).

Where, on appeal of a judgment granting quiet title by adverse possession, the evidence produced by the possessor showed that a fence existed, the inference arose from the keeping of animals that such a fence was maintained, and the evidence was corroborated by witnesses who observed in following years fence posts and post holes, the trial court could permissibly rely upon this evidence in finding a fence existed for five or more years, and that the land adversely possessed was enclosed by a fence. Pilcher v. Dattel, 115 Idaho 79, 764 P.2d 446 (Ct. App. 1988) (now 20 year requirement).

Trial court did not err in quieting title in the adjoining parcel owners to a disputed portion of land where the neighbors did not prove the enclosure and cultivation elements of the adverse possession statute by clear and satisfactory evidence. Utter v. Gibbins, 137 Idaho 361, 48 P.3d 1250 (2002).

Homestead Contest.

The pendency of a homestead contest in the land department of the United States does not suspend the running of the statute of limitations. Northern Pac. R.R. v. Pyle, 19 Idaho 3, 112 P. 678 (1910).

Hostile Intent.

Person claiming title to property by adverse possession has the burden of showing that the possession of disputed property was hostile to that of the real owner and not with the permission of the real owner, since occupation without hostile intent does not constitute adverse possession. If the initial entry of the adverse claimant upon the disputed land was with the permission of the record owner, the statute of limitation will not begin to run against the true owner until the adverse claimant establishes exclusive right in himself. Once it has been established that an adverse claimant's initial entry upon disputed land was with the permission of the record owner, only an unequivocal act by the permissive user brought home to the true owner will start the running of the statute of limitations. Berg v. Fairman, 107 Idaho 441, 690 P.2d 896 (1984).

"Improved" Construed.

The word "improved" in this section means to change or make better or to adapt it more to the purposes for which it is intended than had previously been done and, in case of a mill site used for ordinary mining purposes, it is not necessary that it be either cultivated or enclosed. Trask v. Success Mining Co., 28 Idaho 483, 155 P. 288 (1916).

Clearing brush from fence area believed by plaintiff to be a boundary line, and maintaining the fence, were insufficient to be considered "improvement" as required by subdivision 2 of this section. Persyn v. Favreau, 119 Idaho 154, 804 P.2d 327 (Ct. App. 1990).

Landowner not only placed a mobile home on the land, he also made great efforts to bring the land above the level of the flood plain specifically for the purpose of physical occupation of the land, and brought water service to the land; these were improvements, and the district court's findings that the disputed land had been improved were supported by the evidence. Wilson v. Gladish, 140 Idaho 861, 103 P.3d 474 (Ct. App. 2004).

Inclosure and Improvement.

The requirements of inclosure and improvement in this section are written in the disjunctive, and it is sufficient to show either a substantial inclosure or cultivation of improvement. Lindgren v. Martin, 130 Idaho 854, 949 P.2d 1061 (1997).

Indicia of Boundaries.

A fence can delineate the boundary of property regardless of the location of the actual boundary when the other elements of adverse possession are present. Lindgren v. Martin, 130 Idaho 854, 949 P.2d 1061 (1997).

Land of Blood Relative.

When one occupies the land of a blood relative, such occupation is presumptively with the permission of the true owner. Berg v. Fairman, 107 Idaho 441, 690 P.2d 896 (1984).

Where claimant's predecessors in title to disputed land were blood relatives, she was faced with a presumption of law that the occupation of the disputed strip was permissive and, therefore, it was incumbent upon her to, by affidavit or otherwise, oppose the motion for summary judgment setting forth specific facts that would controvert the presumption of permissive occupation; where the record was devoid of any specific facts controverting the presumption, summary judgment in action to quiet title was proper. Berg v. Fairman, 107 Idaho 441, 690 P.2d 896 (1984).

Lot Number Exception.

Summary judgment quieting title in favor of the claimant was affirmed because the lot

number exception to this section applied to the claimant's cause where his property was described by a lot number for tax purposes, and the claimant provided evidence he paid taxes on his lot from 1996 to 2001; the neighbor did not demonstrate that the county assessor assessed taxes on the neighbor's farm according to a metes and bounds description, but, instead, the assessor used a government survey description from which the precise quantity of land being assessed could not be determined. Roark v. Bentley, 139 Idaho 793, 86 P.3d 507 (2004).

Need to Use.

Where an easement has been created, but no occasion has arisen for its use, the owner of the servient tenement may plant trees, erect a fence, etc., and such use will not be deemed to be adverse, until the need to use the easement arises. Kolouch v. Kramer, 120 Idaho 65, 813 P.2d 876 (1991).

Where common driveway thirteen to twenty-one feet in width was maintained within a thirty-foot easement originally granted, improvements constructed by landowners which interfered with the thirty-foot easement were not adverse and party's right to full width of the easement had not been extinguished because a need to actually utilize the unused portion of the easement had not yet arisen; judgment in favor of party's right to full width of easement was upheld. Winn v. Eaton, 128 Idaho 670, 917 P.2d 1310 (Ct. App. 1996).

Payment of Taxes.

One who fails to pay the taxes on land and informs the assessor that the land belongs to another does not acquire a title by adverse possession. Green v. Christie, 4 Idaho 438, 40 P. 54 (1895).

Payment of taxes must be shown in order to establish title by adverse possession. Brose v. Boise City Ry. & Term. Co., 5 Idaho 694, 51 P. 753 (1897); Blayden v. Morris, 37 Idaho 37, 214 P. 1039 (1923), overruled on other grounds, Scott v. Gubler, 95 Idaho 441, 511 P.2d 262 (1973).

Adverse possession cannot be established unless it is shown that the land has been occupied and claimed for five years continuously, and the claimant or his predecessors have paid all taxes levied upon such land or that the property was exempt from taxation or has never been assessed. Swank v. Sweetwater Irrigation & Power Co., 15 Idaho 353, 98 P. 297 (1908); Dickerson v. Hansen, 32 Idaho 18, 177 P. 760 (1918) (now 20 year requirement).

Payment of all state, county and municipal taxes levied and assessed on land for period of five years is indispensable requirement of statute to establish title by adverse possession. Citizens Right of Way Co. v. Ayers, 32 Idaho 206, 179 P. 954 (1919); Meyer v. Schoeffler, 39 Idaho 500, 227 P. 1061 (1924) (now 20 year requirement).

Claimant holding land by adverse possession need only pay taxes levied and assessed, and where no taxes were levied or assessed on land during a period of eight years in which the claimant held the land under color of title, he could not be divested of his title by adverse possession by a claim that he had not met the requirements of the statutes on adverse possession of paying taxes levied and assessed on the land. Stickel v. Carter, 63 Idaho 78, 117 P.2d 477 (1941) (now 20 year requirement).

Evidence by assessor that he assessed land enclosed by fence in name of claimant established payment of taxes on disputed land, even though assessor did not know for sure that land within fence was owned by claimant. Calkins v. Kousouros, 72 Idaho 150, 237 P.2d 1053 (1951).

Finding of trial court that claimant of strip of land by adverse possession had paid all taxes levied and assessed against land was technically incorrect where evidence showed that no taxes were ever levied against the land, but finding was sufficient to cover favorable finding on matter of taxes in favor of claimant. Hogan v. Blakney, 73 Idaho 274, 251 P.2d 209 (1952).

Daughter of holder of tax title was not entitled to premises based on claim of adverse possession as against original property owner where there was evidence that taxes were paid and possession was claimed under, by, or for holder of tax title. Salvis v. Lawyer, 73 Idaho 469, 253 P.2d 589 (1953).

If there is an established boundary line between tracts occupied by parties, the payment of taxes by the parties is a payment as to the land actually in possession of the respective parties. Edgeller v. Johnston, 74 Idaho 359, 262 P.2d 1006 (1953).

Payment of taxes by parties to quiet title proceeding on their properties as described by the tax rolls constituted payment of taxes on their properties up to the established boundary line between their properties. Beneficial Life Ins. Co. v. Wakamatsu, 75 Idaho 232, 270 P.2d 830 (1954).

The fact that appellants did not nor did their predecessors pay taxes and assessments levied against properties involved would defeat their cause of action seeking to establish fence as boundary of their and adjoining landowners' property. Larson v. Lindsay, 80 Idaho 242, 327 P.2d 775 (1958).

The defendants did not establish adverse possession in a suit to quiet title when they offered no evidence that they had paid the taxes on the property in dispute during the period of limitations. Dickerson v. Brewster, 88 Idaho 330, 399 P.2d 407 (1965).

A village cannot claim title by adverse possession to land on which it has levied and

collected taxes from the record owner during the period of asserted possession. Hamilton v. McCall, 90 Idaho 253, 409 P.2d 393 (1965).

Since, according to the tax collection procedures followed in this state, the counties act as a collecting agency in the collection of taxes for the state and municipality, payment of property taxes to the county rather than the state itself was sufficient to establish payment of taxes as required to sustain a claim pursuant to this section. Rutledge v. State, 94 Idaho 121, 482 P.2d 515 (1971).

The requirement of the payment of taxes is met where the person adversely occupying land which is situated between property owned by him and the property owned by his opponent has paid the required taxes on the property owned by him, because payment of taxes assessed on property deeded to adverse claimant is deemed payment of taxes on the lands in his possession. Hyde v. Lawson, 94 Idaho 886, 499 P.2d 1242 (1972), overruled on other grounds, Nesbitt v. Wolfkiel, 100 Idaho 396, 598 P.2d 1046 (1979).

Where plaintiff, in erecting division fence, enclosed part of adjoining lot, payment of taxes on plaintiff's lot met requirements for adverse possession. Scott v. Gubler, 95 Idaho 441, 511 P.2d 258 (1973).

Where taxes were assessed by lot number rather than by metes and bounds description payment of taxes on the lot within which disputed property is enclosed satisfied the tax payment requirement of this section. Scott v. Gubler, 95 Idaho 441, 511 P.2d 258 (1973).

In a quiet title action, where plaintiff had erected a fence which encroached about 60 feet onto adjacent lot and where plaintiff improved the overlapping strip by planting a lawn and trees and installing a septic tank, plaintiff's payment of all taxes assessed upon the amount of land he claimed for a period longer than five years satisfied the requirements of this section for title by adverse possession, even though the tax assessment sheets did not particularly describe the land being taxed. Flynn v. Allison, 97 Idaho 618, 549 P.2d 1065 (1976) (now 20 year requirement).

Where the record established that no taxes had been levied or assessed against disputed property, the payment of taxes, as one of the prerequisites to adverse possession under this section, was not an issue and need not have been shown. Owen v. Boydstun, 102 Idaho 31, 624 P.2d 413 (1981).

When both the record owner and the adverse possessor have paid taxes on the same parcel of land during the period of adverse possession, the adverse possessor prevails; accordingly, where a county tax plat erroneously showed the northern edge of a street, rather than its center line, as the southern border of the plaintiff adverse possessors' property thereby shifting plaintiffs' property, for assessment purposes, 25 feet to the north of its actual location as described by metes and bounds with the result that both the plaintiffs and the record owner of the property to the north were paying taxes on the 25-foot strip of land, the plaintiffs were entitled to the 25-foot parcel. Trappett v. Davis, 102 Idaho 527, 633 P.2d 592 (1981).

When both the record owner and the adverse occupant have paid taxes on the subject parcel during the alleged period of adverse possession, the adverse occupant prevails. Gage v. Davis, 104 Idaho 48, 655 P.2d 942 (Ct. App. 1982).

A party claiming legal title on an adverse possession theory must establish that he or she has paid all the taxes levied and assessed on the property for the five-year statutory period. Oakley Valley Stone, Inc. v. Alastra, 110 Idaho 265, 715 P.2d 935 (1985) (now 20 year requirement).

Where testimony concerning payment of taxes was uncontradicted, it was sufficient to show compliance with the statutory requirements of this section. DeChambeau v. Estate of Smith, 132 Idaho 568, 976 P.2d 922 (1999).

Adverse possessor's good faith act of paying taxes on disputed land should be given effect and the exception was that, under an oral claim of title, an adverse possessor who occupied the same quantity of land as that to which he held title, and who paid taxes on that amount of land, would be deemed to have paid taxes on that land; there was no reason why this exception would require the adverse possessor to be in possession in any part of his deeded land. Wilson v. Gladish, 140 Idaho 861, 103 P.3d 474 (Ct. App. 2004).

Landowner claimed 0.66 acres of property and was assessed on 0.66 acres of property, and the assessment failed to particularly describe the land being taxed such that it could be identified; therefore, the landowner met the tax payment requirement of this section, where the assessment was made following a viewing of the disputed property, and the assessment described the property being taxed by a generic description which indicated the quantity of property being taxed, but not the specific property itself. Wilson v. Gladish, 140 Idaho 861, 103 P.3d 474 (Ct. App. 2004).

Pleadings and Findings.

In action to quiet title under claim of adverse possession and allegation of payment of taxes, there must be finding as to this issue as it affects judgment. Erickson v. Winegar, 41 Idaho 1, 236 P. 870 (1925).

Sufficiency of Complaint.

Complaint to quiet title which alleged in ordinary and concise language the necessary ultimate facts of ownership, possession, pay-

ment of taxes and adverse claim was sufficient to withstand a demurrer. Edgeller v. Johnston, 74 Idaho 359, 262 P.2d 1006 (1953).

Time Necessary To Establish.

In action to enjoin trespass on real estate and recover damages where affirmative defense of right of way by prescriptive easement was raised and defendants made no claim in fee to the road across plaintiff's land but claimed easement over, upon, and across property admittedly owned in fee by plaintiff, the period of time necessary to establish the prescriptive right was not measured by § 5-209 and this section but by § 5-203. Deer Creek, Inc. v. Hibbard, 94 Idaho 533, 493 P.2d 392 (1972).

Water Locations.

Lawful location or appropriation of water based on adverse possession for the statutory period will bar the true owner from asserting or defending his right to it, though such possession may rest on an original trespass. Hall v. Taylor, 57 Idaho 662, 67 P.2d 901 (1937).

Although there is a presumption that a change in location of a river channel was by accretion rather than avulsion, because the evidence showed that the river literally cut a new channel to the north over approximately a 50-year period, the presumption of accretion was overcome. Nesbitt v. Wolfkiel, 100 Idaho 396, 598 P.2d 1046 (1979).

Cited in: Moss v. Ramey, 14 Idaho 598, 95 P. 513 (1908); Smith v. Yates, 25 Idaho 137, 136 P. 622 (1913); Crandall v. Goss, 30 Idaho 661, 167 P. 1025 (1917); Hellerud v. Hauck, 52 Idaho 226, 13 P.2d 1099 (1932); Cell v. Drake, 61 Idaho 299, 100 P.2d 949 (1940); Stickel v. Carter, 63 Idaho 78, 117 P.2d 477 (1941); Carrington v. Crandall, 65 Idaho 525, 147 P.2d 1009 (1944); Pincock v. Pocatello Gold & Copper Mining Co., 100 Idaho 325, 597 P.2d 211 (1979); Stout v. Westover, 106 Idaho 533, 681 P.2d 1008 (1984); Broadhead v. Hawley, 109 Idaho 952, 712 P.2d 653 (Ct. App. 1985); Cluff v. Bonner County, 121 Idaho 184, 824 P.2d 115 (1992); Shettel v. Bamesberger, 130 Idaho 217, 938 P.2d 1255 (Ct. App. 1997); Baxter v. Craney, 135 Idaho 166, 16 P.3d 263 (2000).

RESEARCH REFERENCES

Am. Jur. — 3 Am. Jur. 2d, Adverse Possession, §§ 26 to 166.

C.J.S. — 2 C.J.S., Adverse Possession, §§ 37, 40, 41, 149 to 205, 209 to 224.

A.L.R. — Use of property by public as affecting acquisition of title by adverse possession. 56 A.L.R.3d 1182.

5-211. Possession of tenant — Presumptions. — When the relation of landlord and tenant has existed between any persons, the possession of the tenant is deemed the possession of the landlord until the expiration of twenty (20) years from the termination of the tenancy, or, where there has been no written lease, until the expiration of twenty (20) years from the time of the last payment of rent, notwithstanding that such tenant may have acquired another title, or may have claimed to hold adversely to his landlord. But such presumptions cannot be made after the periods herein limited.

History.

C.C.P. 1881, § 151; R.S., R.C., & C.L., § 4044; C.S., § 6604; I.C.A., § 5-211; am. 2006, ch. 158, § 6, p. 474.

STATUTORY NOTES

Amendments.

The 2006 amendment, by ch. 158, substituted "twenty (20) years" for "five (5) years."

JUDICIAL DECISIONS

Analysis

Adverse possession.
Executory contract for sale of land.

Adverse Possession.

Where one was in possession of land as a tenant, he could not hold adversely to his landlord. Cusic v. Givens, 70 Idaho 229, 215 P.2d 297 (1950), overruled on other grounds, Cardenas v. Kurpjuweit, 116 Idaho 739, 779 P.2d 414 (1989).

Executory Contract for Sale of Land.

Where an executory contract for the sale of land provided that, in case of default, every person claiming under purchaser should be vendor's tenant, possession of purchaser's assignee did not become adverse to vendor until he surrendered the possession to which he was entitled under the contract as vendor's tenant. White v. Garrett, 49 Idaho 136, 286 P. 362 (1930).

Cited in: Lucky Five Mining Co. v. Central Idaho Placer Gold Mining Co., 71 Idaho 490, 235 P.2d 319 (1951); Capps v. Wood, 110 Idaho 778, 718 P.2d 1216 (1986).

RESEARCH REFERENCES

Am. Jur. — 3 Am. Jur. 2d, Adverse Possession, §§ 215 to 229.

C.J.S. — 52 C.J.S., Landlord and Tenant, §§ 515 to 517, 519.

5-212. Descent cast does not affect right. — The right of a person to the possession of real property is not impaired or affected by a descent cast in consequence of the death of a person in possession of such property.

History.

C.C.P. 1881, § 152; R.S., R.C., & C.L., § 4045; C.S., § 6605; I.C.A., § 5-212.

JUDICIAL DECISIONS

Cited in: Burns v. Skogstad, 69 Idaho 227, 206 P.2d 765 (1949).

RESEARCH REFERENCES

Am. Jur. — 3 Am. Jur. 2d, Adverse Possession, § 227.

C.J.S. — 2 C.J.S., Adverse Possession, § 157.

5-213. Persons under disabilities — Recovery of real property. — If a person entitled to commence an action for the recovery of real property, or for the recovery of the possession thereof, or to make any entry or defense founded on the title to real property, or to rents or services out of the same, be at the time such title first descends or accrues, either:

1. Within the age of majority; or,
2. Insane; or,
3. Imprisoned on a criminal charge, or in execution, upon conviction of a criminal offense, for a term less than for life; or,
4. A married woman, and her husband be a necessary party with her in commencing such action or making such entry or defense.

The term during which such disability continues is not deemed any portion of the time in this title limited for the commencement of such action or the making of such entry or defense, but such action may be commenced, or entry or defense made, within the period of twenty (20) years after such disability shall cease, or after the death of the person entitled who shall die under such disability; but such action shall not be commenced or entry or defense made after that period.

History.
C.C.P. 1881, § 153; R.S., R.C., & C.L., § 4046; C.S., § 6606; I.C.A., § 5-213; am. 2006, ch. 158, § 7, p. 474.

STATUTORY NOTES

Cross References.
Actions other than for recovery of real property, disability of persons, § 5-230.
Coexisting disabilities, effect, § 5-236.
Disability must exist when right of action accrued, § 5-235.

Amendments.
The 2006 amendment, by ch. 158, substituted "twenty (20) years" for "five (5) years" in the last paragraph.

JUDICIAL DECISIONS

Analysis

Commencement of statutory period.
Foreclosure.
Minors.
Property held by trustee.

Commencement of Statutory Period.
Statute of limitations for recovery of real estate by minor does not start to run until after minor reaches majority. Chapin v. Stewart, 71 Idaho 306, 230 P.2d 998 (1951).

Foreclosure.
This section does not apply to toll the statutory right of redemption of real property foreclosed upon while debtor is incompetent. Southern Idaho Prod. Credit Ass'n v. Ruiz, 105 Idaho 140, 666 P.2d 1151 (1983).

Minors.
Title by adverse possession can not be acquired against minors during minority. Harris v. McCrary, 17 Idaho 300, 105 P. 558 (1909).

Where co-tenant acquired real estate from other tenants after closing of estate, claim of minor heirs of one of the tenants to real estate was barred where claim was not asserted until 22 years after youngest minor reached majority. Chapin v. Stewart, 71 Idaho 306, 230 P.2d 998 (1951).

Property Held by Trustee.
Where the title claimed by minors was held for them by a trustee, the right of action against one in adverse possession was in the trustee and not in the beneficiaries and the running of the statute was not tolled during the minority of such beneficiaries. Jones v. State, 91 Idaho 823, 432 P.2d 420 (1967).

RESEARCH REFERENCES

Am. Jur. — 51 Am. Jur. 2d, Limitation of Actions, §§ 216, 221 to 235, 241, 242.
C.J.S. — 54 C.J.S., Limitations of Actions, § 135 et seq.

A.L.R. — Effect of appointment of legal representative for minor on running of state statute of limitations against minor. 1 A.L.R.6th 407.

5-214. Actions other than for recovery of real property. — The periods prescribed for the commencement of actions other than for the recovery of real property are as follows.

History.
C.C.P. 1881, § 154; R.S., R.C., & C.L., § 4050; C.S., § 6607; I.C.A., § 5-214.

STATUTORY NOTES

Cross References.
Annulment of marriage, § 32-502.
Conservator of estate of persons under disability, bond, § 15-5-411.

Divorce, § 32-615.
Livestock, action against railroad for killing, § 62-408.

Pleading the statute of limitations, Idaho Civil Procedure Rule 9(h).

JUDICIAL DECISIONS

ANALYSIS

Burden of proof.
Commencement of statutory period.
Cross-complaint.
Malpractice action.
Suits for services.
Unconstitutional laws.

Burden of Proof.

Statute of limitations is affirmative defense which imposes burden upon one asserting it of proving every element necessary to establish it. Johnston v. Keefer, 48 Idaho 42, 280 P. 324 (1929).

Commencement of Statutory Period.

Where a contract contains an acceleration clause, positive in its terms and without optional features, a default under said clause renders the entire indebtedness due and the statute runs from such default. Canadian Birkbeck Inv. & Sav. Co. v. Williamson, 32 Idaho 624, 186 P. 916 (1920); Perkins v. Swain, 35 Idaho 485, 207 P. 585 (1922).

In action to recover purchase price of stock, cause of action ordinarily accrues only upon demand. Johnston v. Keefer, 48 Idaho 42, 280 P. 324 (1929).

Where no time is fixed for demand, it will be presumed to have been made in reasonable time or at expiration of period within which statute would have run from its date, and statute is then set in motion. Johnston v. Keefer, 48 Idaho 42, 280 P. 324 (1929).

Where no time is specified for doing of act, other than payment of money, it is rule of law that demand for performance is necessary in order to put promisor in default. Johnston v. Keefer, 48 Idaho 42, 280 P. 324 (1929).

In malpractice action, summary judgment based upon statute of limitations was upheld because plaintiff failed to establish a triable issue of material fact respecting fraudulent concealment of bullet in the body, where plaintiff's sole affidavit contained no reference to the time when the bullet was discovered but a general statement that it was discovered within two years, no time as to feeling of pain was specific, surgeon who found bullet was not identified and no discussion of particulars as to alleged misleading by surgeon was given. Johnson v. Gorton, 94 Idaho 595, 495 P.2d 1 (1972).

Cross-Complaint.

In an action by a surety company on a bond of a bank securing repayment of a city's deposits of public funds, for amount allegedly paid in excess of surety's pro rata share of amount due city, cross-complaint alleging that, through mistake and belief that the penal sum of the bond had been validly reduced, the receiver of the bank made payment in excess of the pro rata share chargeable to the bonds pledged by the bank to secure repayment of deposits, was barred by three-year limitations on actions for relief on the ground of mistake, where cross-complaint was filed Sept. 17, 1937, and the last payment by the receiver was made June 4, 1934, and receiver's letter of Dec. 12, 1932, showed that he was familiar with the facts constituting the invalid effort to reduce the penal sum of the bond. Commercial Cas. Ins. Co. v. Boise City Nat'l Bank, 61 Idaho 124, 98 P.2d 637 (1940).

In an action by a surety upon a bond of a bank securing repayment of a city's deposits of public funds for amount allegedly paid in excess of surety's pro rata share of amount due city, three-year limitation on action on liability created by statute other than penalty or forfeiture, was inapplicable to a cross-complaint for amount allegedly paid by the receiver of the bank, in excess of the pro rata share chargeable to bonds pledged by bank to secure repayment of deposits. Commercial Cas. Ins. Co. v. Boise City Nat'l Bank, 61 Idaho 124, 98 P.2d 637 (1940).

Malpractice Action.

Fraudulent concealment does toll the statute of limitations in a malpractice action until the plaintiff discovers or should have discovered the injury resulting from negligent treatment. Johnson v. Gorton, 94 Idaho 595, 495 P.2d 1 (1972).

Suits for Services.

In suit for services rendered over a period of years, statute begins running at the end of the service. Hubbard v. Ball, 59 Idaho 78, 81 P.2d 73 (1938).

Unconstitutional Laws.

Acquiescence in an unconstitutional statute, for many years, will not render it valid; lapse of time, however long, will not operate

to validate an invalid law, and the statute of limitations cannot be invoked to defeat the right to question an unconstitutional statute. Continental Oil Co. v. City of Twin Falls, 49 Idaho 89, 286 P. 353 (1930).

Cited in: Hillock v. Idaho Title & Trust Co., 22 Idaho 440, 126 P. 612 (1912); Olympia Mining & Milling Co. v. Kerns, 24 Idaho 481, 135 P. 255 (1913); Gaffney v. Royal Neighbors of Am., 31 Idaho 549, 174 P. 1014 (1918); Blaine County v. Butte County, 45 Idaho 193, 261 P. 338 (1927); Martin v. Clements, 98 Idaho 906, 575 P.2d 885 (1978); Owyhee County v. Rife, 100 Idaho 91, 593 P.2d 995 (1979); Pichon v. Benjamin, 108 Idaho 852, 702 P.2d 890 (Ct. App. 1985); Simons v. Simons, 134 Idaho 824, 11 P.3d 20 (2000).

5-214A. Action to foreclose mortgage on real property. — An action for the foreclosure of a mortgage on real property must be commenced within five (5) years from the maturity date of the obligation or indebtedness secured by such mortgage. If the obligation or indebtedness secured by such mortgage does not state a maturity date, then the date of the accrual of the cause of action giving rise to the right to foreclose shall be deemed the date of maturity of such obligation or indebtedness.

History.

I.C., § 5-214A, as added by 1951, ch. 254, § 1, p. 552; am. 1999, ch. 112, § 1, p. 339.

STATUTORY NOTES

Compiler's Notes.

Section 2 of S.L. 1951, ch. 254, p. 553, provided: "If the said period of five years has expired, or will expire before September 1, 1951, the holder or owner of the obligation or indebtedness secured by such mortgage or lien shall have until September 1, 1951, within which to file for record, in the county or counties where said mortgage or lien is recorded, such agreement or affidavit of extension as heretofore provided."

Effective Dates.

Section 3 of S.L. 1951, ch. 254 declared an emergency. Approved March 20, 1951.

JUDICIAL DECISIONS

Analysis

Action not barred.
Bankruptcy.
Federal sovereign immunity.
Immediacy.

Action Not Barred.

In action on promissory note secured by mortgage on real property to guaranty payment of trade acceptance agreement, where the suit was filed within five years of the date on which default on the first trade acceptance occurred, the statute of limitations did not bar foreclosure of the mortgage. Gebrueder Heidemann, K.G. v. A.M.R. Corp., 107 Idaho 275, 688 P.2d 1180 (1984).

Action on the farm's mortgage was not time-barred where the farm had bargained away its limitations defense by acknowledging that it had a continued obligation under the promissory note; the farm was well aware that the debt was still owed to the property owners and in consideration for the extension of time for repayment on the promissory notes. Elliott v. Darwin Neibaur Farms, 138 Idaho 774, 69 P.3d 1035, cert. denied, 540 U.S. 1004, 124 S. Ct. 535, 157 L. Ed. 2d 410 (2003).

Bankruptcy.

Although Idaho's statute of limitations for foreclosure of a deed of trust had lapsed, this did not allow the Chapter 7 Trustee to avoid the lien under 11 U.S.C.S. § 544(a). Under Idaho law, in order for a bona fide purchaser to prevail against the beneficiary under a deed of trust, that purchaser must first record its instrument of conveyance; the trustee was not such a purchaser. Rainsdon v. Mullen (In re Mullen), 402 B.R. 353 (Bankr. D. Idaho 2008).

Federal Sovereign Immunity.

Federal sovereign immunity exempts the United States from state statutes of limitation, and, therefore, it was improper for the trial court to dismiss the United States' foreclosure action based on this section. Johnson v. United States, 127 Idaho 384, 901 P.2d 491 (1991).

Immediacy.

Neither § 6-101 nor § 6-108 requires a mortgagee to bring a foreclosure action immediately after a default; this section permits an action for the foreclosure of a real estate mortgage to be brought within five years of the date of maturity. Isaak v. Idaho First Nat'l Bank, 119 Idaho 907, 811 P.2d 832 (1991).

5-215. Action on judgment or for mesne profits of real property. — Within six (6) years:

1. An action upon a judgment or decree of any court of the United States, or of any state or territory within the United States.

2. An action for mesne profits of real property.

History.

C.C.P. 1881, § 155; R.S., R.C., & C.L., § 4051; C.S., § 6608; I.C.A., § 5-215.

STATUTORY NOTES

Cross References.

Time for execution limited to five years, § 11-101; but may be extended by leave or judgment, § 11-105.

JUDICIAL DECISIONS

Analysis

Action in another state.
Action on judgment.
Child support judgment.
Exclusion of lands from irrigation district.
Foreign actions.
Interruption of running of statute.
Judgment lien removed as cloud.
Judgments payable in instalments.
Revived judgment.
Right to execution immaterial.
Surety's suit on stay bond.

Action in Another State.

Since an action on a judgment is a new and separate action on the debt represented by a prior judgment, if plaintiff brought a new action on the original Oregon judgment in Oregon, instead of simply renewing the original judgment, Idaho courts could not have refused enforcement of the new judgment on the ground that this section would have barred a similar action in Idaho but would be constitutionally required under the Full Faith and Credit clause to recognize the new judgment so long as enforcement was sought within six years. G & R Petro., Inc. v. Clements, 127 Idaho 119, 898 P.2d 50 (1995).

Action on Judgment.

A cause of action on a judgment against a corporation which has forfeited its charter, for failure to pay its annual license tax, is not created by statute and is not barred in three years, as provided in § 5-218; rather, this section applies and action on judgment against trustees of defunct corporation is barred by this section in six years. Caxton Printers v. Ulen, 59 Idaho 688, 86 P.2d 468 (1939).

Child Support Judgment.

In a case for child support arrearages stemming back to 1979, § 5-245 and this section were correctly applied to allow the mother to collect all arrearages from the enactment of § 5-245 in 1988 forward, as well as arrearages which had accrued within six years from the 1988 enactment of § 5-245. Stonecipher v. Stonecipher, 131 Idaho 731, 963 P.2d 1168 (1998).

Exclusion of Lands from Irrigation District.

In a proceeding to exclude land from an irrigation district, the petition alleging that the petitioner was successor in interest to one

whose land had previously been decreed to be excluded from irrigation district, which wrongfully levied and collected assessments on such lands, was not demurrable on the ground that the petitioner had no legal capacity to sue, that the action was barred by the statute of limitations and by laches of petitioner. Nielson v. Board of Directors, 63 Idaho 108, 117 P.2d 472 (1931).

Foreign Actions.

Because an action which arose in Canada was not time barred in Canada when original or amended pleadings were filed in Idaho, the provisions of § 5-239 were not applicable and Idaho's limitation period applied. Attorney Gen. ex rel. Her Majesty the Queen in Right of Can. v. Tysowski, 118 Idaho 737, 800 P.2d 133 (Ct. App. 1990).

By expressly including judgments of the United States and its states and territories, the legislature impliedly excluded from the scope of the statute all other foreign judgments. Attorney Gen. ex rel. Her Majesty the Queen in Right of Can. v. Tysowski, 118 Idaho 737, 800 P.2d 133 (Ct. App. 1990).

Where renewed judgment sought to be filed in 1993 was a mere extension of the 1981 Oregon judgment that was previously fully recognized in Idaho in 1987, since the applicable statute of limitations on the enforcement had run, the Idaho courts were not required by the U.S. Constitution to accord it full faith and credit; thus, the renewed judgment was not a "foreign judgment" within the meaning of § 10-1301, and was not properly filed under the enforcement of foreign judgments act. G & R Petro., Inc. v. Clements, 127 Idaho 119, 898 P.2d 50 (1995).

Interruption of Running of Statute.

Action under this section may be tolled by showing that party has moved outside state. Simonton v. Simonton, 33 Idaho 255, 193 P. 386 (1920).

Judgment Lien Removed as Cloud.

The five years during which the lien of a judgment is granted by statute operate as a substantive part and limitation on the right created, not as a mere defense to be pleaded or waived, and, hence, such lien should be removed as a cloud on the judgment debtor's title after five years have elapsed without payment or removal of the judgment. Platts v. Pacific First Fed. Sav. & Loan Ass'n, 62 Idaho 340, 111 P.2d 1093 (1941).

Judgments Payable in Instalments.

Where judgment is made payable in instalments, statute applies to each instalment separately and does not begin to run on any instalment until it is due. Simonton v. Simonton, 33 Idaho 255, 193 P. 386 (1920).

Where a judgment is made payable in installments, as for alimony, the statute of limitations applies to each installment separately and does not begin to run on any installment until it is due. Cormana v. Naron, 37 Idaho 482, 217 P. 597 (1923).

Revived Judgment.

Where a judgment entered in a foreign jurisdiction is revived in that jurisdiction, the statute of limitations begins to run in this state from the date of the judgment of revivor. Leman v. Cunningham, 12 Idaho 135, 85 P. 212 (1906).

Section 5-238, requiring that acknowledgment taking contract out of statute must be in writing and signed by the debtor, held to apply to judgments. Woods v. Locke, 49 Idaho 486, 289 P. 610 (1930).

Right to Execution Immaterial.

The right to maintain an action on a judgment is not dependent upon the right to issue an execution thereon, but is governed by this section. Bashor v. Beloit, 20 Idaho 592, 119 P. 55 (1911).

Surety's Suit on Stay Bond.

Suit by surety on stay bond paying deficiency judgment after foreclosure sale became subrogated to rights of judgment creditor and is governed by this section, instead of § 5-217. Great Am. Indem. Co. v. Bisbee, 59 Idaho 18, 79 P.2d 1037 (1938).

Cited in: Gwinn v. Melvin, 9 Idaho 202, 72 P. 961 (1903); Sterrett v. Sweeney, 15 Idaho 416, 98 P. 418 (1908); Idaho Trust & Sav. Bank v. Nampa & Meridian Irrigation Dist., 29 Idaho 658, 161 P. 872 (1916); Rogers v. Rogers, 42 Idaho 158, 243 P. 655 (1926); Burns v. Skogstad, 69 Idaho 227, 206 P.2d 765 (1949); Whitehead v. Van Leuven, 347 F. Supp. 505 (D. Idaho 1972); Thomas v. Goff, 100 Idaho 282, 596 P.2d 794 (1979); Annest v. Conrad-Annest, Inc., 107 Idaho 468, 690 P.2d 923 (1984); Estate of Thompson v. Turner, 107 Idaho 470, 690 P.2d 925 (1984); Bankers Life & Cas. Co. v. Gilmore, 141 Bankr. 734 (Bankr. D. Idaho 1992).

5-216. Action on written contract. — Within five (5) years:

An action upon any contract, obligation or liability founded upon an instrument in writing.

The limitations prescribed by this section shall never apply to actions in the name or for the benefit of the state and shall never be asserted nor

interposed as a defense to any action in the name or for the benefit of the state although such limitations may have become fully operative as a defense prior to the adoption of this amendment.

History.
C.C.P. 1881, § 156; R.S., R.C., & C.L., § 4052; C.S., § 6609; I.C.A., § 5-216; am. 1939, ch. 244, § 1, p. 590.

STATUTORY NOTES

Cross References.
Limitations generally applicable to state, § 5-225.

Compiler's Notes.
The words "prior to the adoption of this amendment" referred to the 1939 amendment which was adopted March 11, 1939.

JUDICIAL DECISIONS

Analysis

Absence of Contractual Duty.
Where the plaintiffs were attempting to recover on a contract to which it was not shown they were a party, and where the plaintiffs had not shown any contractual duty owed them by defendant, the trial court was correct in applying the three-year fraud statute of limitations of § 5-218. Barnett v. Aetna

Life Ins. Co., 99 Idaho 246, 580 P.2d 849 (1978).

Action Barred.

Where in an action for damages resulting from the seller's representations that the property extended beyond the highway and the purchaser could build over the road, the purchaser knew of the existence of the highway prior to the execution of the contract for the sale of the property in 1974, and the breach of contract action was not brought until 1982, the statute of limitations precluded the purchaser from asserting a breach of contract. Lido Van & Storage, Inc. v. Kuck, 110 Idaho 939, 719 P.2d 1199 (1986).

Husband and wife attempted to recover loans made to decedent's farming operation, which was a partnership; however, the statute of limitations barred recovery, despite the husband's and wife's contention that the parties had entered into a stipulation, which was not an acknowledgment of the loans. Reding v. Reding, 141 Idaho 369, 109 P.3d 1111 (2005).

Application.

A statute of limitations does not apply to defenses where no affirmative relief is sought, or to self-help set-offs and pledges. Smith v. Idaho State Univ. Fed. Credit Union, 114 Idaho 680, 760 P.2d 19 (1988).

Attorney's Fees.

Action on policy of life insurance in which temporary contract of insurance was found to exist was governed by five year limitation of this section; therefore, attorney's fees, being part of the relief granted in the case limitation of this section also applied to such fees and not the two year limitation of subsection (2) of § 5-219. Dunford v. United of Omaha, 95 Idaho 282, 506 P.2d 1355 (1973).

Carey Act Water Contracts.

Section 42-2026, relative to lien for purchase price of Carey Act water contract, does not except such water contracts from operation of this section and, therefore, does not preserve all remedies for their enforcement without regard to lapse of time. Mendini v. Milner, 47 Idaho 439, 276 P. 313 (1929).

Claim Against Decedent's Estate.

Where money claim against decedent's estate was presented to executor within statutory six-month period, and rejected by him some two years and eight months later, and suit was instituted within statutory three months from rejection by executor and the general statute of limitations of five years had not run either at the time of decedent's death, or at time claim was presented to executor, the claim was controlled by probate statute and hence regardless of whether five year period had expired the general statute of limitations was stayed by the probate proceedings until executor's disallowance of the claim. Cummings v. Langroise, 36 F. Supp. 174 (D. Idaho 1940), aff'd 123 F.2d 969 (9th Cir. 1941), cert. denied, 316 U.S. 664, 62 S. Ct. 944, 86 L. Ed. 1741 (1942).

The general five-year limitation is superseded by the provisions of the probate statute relating to the filing of claims against an estate and the bringing of suit upon a rejected claim which had theretofore been presented to the executor or administrator and during the time the executor is considering the claim, the creditor is prohibited from instituting suit thereon, and the time intervening between the death of the decedent, and the time the claim is rejected is not to be computed as any part of the time within which the action must be brought. Cummings v. Langroise, 36 F. Supp. 174 (D. Idaho 1940), aff'd 123 F.2d 969 (9th Cir. 1941), cert. denied, 316 U.S. 664, 62 S. Ct. 944, 86 L. Ed. 1741 (1942).

Commencement of Running of Statute.

Where a contract contains an acceleration clause, positive in its terms and without optional features, a default under said clause renders the entire indebtedness due, and the statute runs from such default. Canadian Birkbeck Inv. & Sav. Co. v. Williamson, 32 Idaho 624, 186 P. 916 (1920); Perkins v. Swain, 35 Idaho 485, 207 P. 585 (1922).

Statute begins to run in favor of defendant at time cause of action accrues against him. Rawleigh Medical Co. v. Atwater, 33 Idaho 399, 195 P. 545 (1921); Perkins v. Swain, 35 Idaho 485, 207 P. 585 (1922); Ellis v. Capps, 46 Idaho 606, 269 P. 597 (1928).

Right of action on absolute contract of guaranty accrues immediately upon the breach of an obligation guaranteed. Rawleigh Medical Co. v. Atwater, 33 Idaho 399, 195 P. 545 (1921).

Statute begins to run against warrant-holder when his cause of action accrues. Little v. Emmett Irrigation Dist., 45 Idaho 485, 263 P. 40 (1928).

Cause of action of warrant-holder accrues when fund upon which warrant is drawn is raised or when statute provides or implies due date for warrant, or imposes duty upon municipality to levy and collect fund and sufficient time has lapsed to provide such fund and it has failed or neglected to do so. Little v. Emmett Irrigation Dist., 45 Idaho 485, 263 P. 40 (1928).

If holder of warrant issued under contract relation has remedy which he may pursue at time of its issuance, statute begins to run then. Little v. Emmett Irrigation Dist., 45 Idaho 485, 263 P. 40 (1928).

The statute of limitations begins to run in favor of a stockholder when, under the terms of a particular statute or facts of a particular

case, the cause of action accrued against him. Ellis v. Capps, 46 Idaho 606, 269 P. 597 (1928).

Instrument payable on demand is due immediately, and the statute commences to run from the date of its execution. Mahas v. Kasiska, 47 Idaho 179, 276 P. 315 (1928).

Statute of limitations begins to run upon bonds given in attachment proceedings immediately upon the return of the execution. Stewart v. Slater, 61 Idaho 628, 105 P.2d 729 (1940).

Where a corporation sold the stock of one of its shareholders to pay a delinquent assessment thereon, even though it be conceded that the assessment was illegal, the shareholder's remedy accrued immediately upon the making of such assessment, or as soon thereafter as the shareholder had knowledge thereof, and the statutes of limitation then began to run. State ex rel. Brooks v. Overland Beverage Co., 69 Idaho 126, 203 P.2d 1009 (1949).

Complaint brought by purchasers against vendors for rescission or damages based on the fact that one cabin and certain sewer pipes and part of a service station encroached upon the right-of-way of the city was not barred by the provisions of this section and § 5-218 where such knowledge of encroachment was had on December 29, 1952, and action was filed January 18, 1954. Galvin v. Appleby, 78 Idaho 457, 305 P.2d 309 (1956).

An amendment to a complaint alleging partner to be continuing business to date though preventing appellant partner from active participation considered in conjunction with other material facts alleged would clearly state facts sufficient to constitute a cause of action not barred by the statute of limitations, as set out in this section or § 5-217. Markstaller v. Markstaller, 80 Idaho 129, 326 P.2d 994 (1958).

Where record showed that more than five years elapsed between the time the cause of action accrued and the time suit was instituted, lessors were entitled to rely on the statute of limitations as a defense to lessees' claim for alleged breach of contract. Skaggs v. Jensen, 94 Idaho 179, 484 P.2d 728 (1971).

Where money is payable in instalments, the statute begins to run against recovery of a delinquent instalment when it becomes due. H.M. Chase Corp. v. Idaho Potato Processors, Inc., 96 Idaho 398, 529 P.2d 1270 (1974).

Since an action on an indemnity agreement does not accrue until the indemnitor suffers damage or loss, the five-year statute of limitations on written contracts did not bar a warehouse bond surety's action against the warehouseman for indemnification pursuant to a 1964 indemnity agreement, where the surety's action did not accrue until 1973 when the state closed the bonded warehouse. State Dep't of Agric. v. Millers Nat'l Ins. Co., 97 Idaho 323, 543 P.2d 1163 (1975).

An action for the enforcement of a vendor's lien and an action for the unpaid purchase price are interrelated and it is reasonable to conclude that the legislative intent was to allow the statute of limitations for the lien claim to run only where the statute of limitations runs to bar the claim for the debt. Blankenship v. Myers, 97 Idaho 356, 544 P.2d 314 (1975).

Debtor's suit for breach of contract, against bank issuing credit card, based on the erroneous reporting of credit information, was not barred by the statute of limitations because the earliest act which could be considered the basis for the breach occurred when bank stopped sending monthly statements to debtors, which occurred within the five year period. Hoglan v. First Sec. Bank, 120 Idaho 682, 819 P.2d 100 (1991).

The plaintiffs' claim for specific performance of an agreement to convey real property was not barred by the statute of limitations where the statute did not begin to run until mortgages or loans encumbrancing the property at issue were extinguished, thereby fulfilling a condition in the agreement and requiring the defendant to convey the property. Simons v. Simons, 134 Idaho 824, 11 P.3d 20 (2000).

Simple statements of land ownership were factually true assertions and did not give rise to a cause of action; the associations' cause of action began to run when the landowners first gave notice to the association that no rights, even the limited right to use the land for recreational purposes, existed. Saddlehorn Ranch Landowner's, Inc. v. Dyer, 146 Idaho 747, 203 P.3d 677 (2009).

Conflict of Laws.

To determine the application of the statute of limitations of Idaho to a contract entered into in another state, the contract and the laws of the other state must be examined for determining the date from which the statute runs. Sterrett v. Sweeney, 15 Idaho 416, 98 P. 418 (1908).

In the absence of a local statute changing the rule, the limitation of time for bringing an action upon a contract depends upon the law of the forum. Canadian Birkbeck Inv. & Sav. Co. v. Williamson, 32 Idaho 624, 186 P. 916 (1920).

Even if an Idaho court would allow reformation of an insurance policy, it would not recognize the parties' choice of Illinois law on the statute of limitation issue where Idaho had a materially greater interest in the statute of limitation as the forum state within which the damaged property was located and Idaho has expressed a fundamental policy by requiring strict adherence to its statutory limitations period. Industrial Indem. Ins. Co.

v. United States, 757 F.2d 982 (9th Cir. 1985).

In a suit by the United States against a railroad's insurance company for reimbursement for compensation paid under the Teton Dam Disaster Assistance Act (see P.L. 94-400), the Idaho five year statute of limitations overrode the contractual one year limitation and when the government acquired its claims the six year federal limitation became applicable. Industrial Indem. Ins. Co. v. United States, 757 F.2d 982 (9th Cir. 1985).

Construction.

The statute of limitations is general, is to be liberally construed, and must be applied to all cases where an exception is not specifically made. Mendini v. Milner, 47 Idaho 439, 276 P. 313 (1929).

Contract for Sale of Goods.

Section 28-2-725, and not this section, controls all actions for breach of contract for the sale of goods. Farmers Nat'l Bank v. Wickham Pipeline Constr., 114 Idaho 565, 759 P.2d 71 (1988).

Contracts Reducing Period Void.

Provision in health and accident policy that no action could be brought on the policy unless brought within two years after expiration of time to make proof of loss is void. Harding v. Mutual Benefit Health & Accident Ass'n, 55 Idaho 131, 39 P.2d 306 (1934).

Court of Equity.

A court of equity is not bound to apply statute of limitations which works an injustice to the creditor, and when unusual conditions or extraordinary circumstances make it inequitable. Cummings v. Langroise, 36 F. Supp. 174 (D. Idaho 1940), aff'd 123 F.2d 969 (9th Cir. 1941), cert. denied, 316 U.S. 664, 62 S. Ct. 944, 86 L. Ed. 1741 (1942). But see Steinour v. Oakley State Bank, 49 Idaho 293, 287 P. 949 (1930).

Where the plaintiff who has loaned decedent large sums of money under circumstances, and at times, when it was greatly needed in the preservation of the decedent's estate, to support himself, and for the payment of numerous large counsel fees, and, upon decedent's death, the plaintiff brought an action for the amount of the loans and sought the enforcement of a lien on the interest of the decedent in an estate, a federal district court sitting as a court of equity would not adjudge that recovery was barred by the five-year statute of limitations even if it could properly do so. Cummings v. Langroise, 36 F. Supp. 174 (D. Idaho 1940), aff'd 123 F.2d 969 (9th Cir. 1941), cert. denied, 316 U.S. 664, 62 S. Ct. 944, 86 L. Ed. 1741 (1942).

Creditor's Action on Debt Independent of Foreclosure.

Holders of a promissory note secured by a deed of trust, who sued for a money judgment on the note, were not subject to the statutory limitations applicable to a deficiency action following foreclosure; the time limit provided for in § 45-1512 applies to deficiency actions resulting from foreclosure sales; it does not apply to a creditor's action on the debt which is independent of any foreclosure proceedings; under these circumstances, a creditor has five years in which to bring an action upon his promissory note, as provided for in this section. Tanner v. Shearmire, 115 Idaho 1060, 772 P.2d 267 (Ct. App. 1989).

Deficiency Judgment after Foreclosure in Another State.

In an Idaho deficiency judgment action after a Utah foreclosure action, the Idaho court could determine if any instalments, which matured prior to the commencement of the foreclosure, were barred by the Idaho statute of limitations, but could not defer the maturity of instalments already matured by election under an acceleration clause of the contract. American Mut. Bldg. & Loan Co. v. Kesler, 64 Idaho 799, 137 P.2d 960 (1943).

Effect of Acceleration Clause.

Where the clause of acceleration of maturity of a mortgage upon default in payment of an instalment of interest or principal or upon other default provides unconditionally for the maturity of the entire indebtedness, irrespective of the pleasure or option of the mortgagee, the indebtedness becomes due upon a default of the nature provided for and the statute of limitations runs from such default; but where the acceleration clause gives merely an election or option to the mortgagee to declare the entire indebtedness due, the statute of limitations does not run as to the entire indebtedness from a default, unless there is an affirmative election by the mortgagee. Union Cent. Life Ins. Co. v. Keith, 58 Idaho 471, 74 P.2d 699 (1937).

Where defendant claimed that there had been an exercise of an option under acceleration clause in a mortgage and that the debt was due for more than five years, and the mortgagee had many officers and agents throughout the state, such mortgagee was entitled to a bill of particulars from the defendant setting out in advance of trial what particular officer or agent it would be claimed exercised the option under said acceleration clause. Union Cent. Life Ins. Co. v. Nielson, 62 Idaho 483, 114 P.2d 252 (1941).

Where a mortgagee availed itself of the benefits of an acceleration clause in a mortgage, future instalments were immediately matured for all purposes, and the statute of limitations then began to run against unmatured instalments and continued to run against past due instalments. American Mut. Bldg. & Loan Co. v. Kesler, 64 Idaho 799, 137 P.2d 960 (1943).

Where a mortgagee in a Utah foreclosure action elected to declare all instalments due, in an Idaho action for a deficiency judgment based upon such foreclosure, such instalments, in relation to the statute of limitations, could not be considered as separate causes of action. American Mut. Bldg. & Loan Co. v. Kesler, 64 Idaho 799, 137 P.2d 960 (1943).

If an action brought in 1964 constituted an election to accelerate all payments under a promissory note, the statute of limitations began to run against the entire indebtedness at that time, but, if there was no election to accelerate the terms of the note, the statute of limitations applied to each installment separately and did not begin to run on any installment until it was due. Thomas v. Goff, 100 Idaho 282, 596 P.2d 794 (1979).

Enforcement of Public Right.

Where the actions of the department of transportation were consistent with the exercise of its police powers, as authorized by the legislature, their actions were not barred by the statute of limitations, because statutes of limitations do not operate against the state when the state is acting in its sovereign capacity to enforce a public right. Young Elec. Sign Co. v. State ex rel. Winder, 135 Idaho 804, 25 P.3d 117 (2001).

Estoppel.

The elements of equitable estoppel, the only non-statutory bar to a statute of limitation defense in Idaho, are: (1) a false representation or concealment of a material fact with actual or constructive knowledge of the truth; (2) that the party asserting estoppel did not know or could not discover the truth; (3) that the false representation or concealment was made with the intent that it be relied upon; and (4) that the person to whom the representation was made, or from whom the facts were concealed, relied and acted upon the representation or concealment to his prejudice. J.R. Simplot Co. v. Chemetics Int'l, Inc., 126 Idaho 532, 887 P.2d 1039 (1994).

Estoppel does not "extend" a statute of limitation. Rather, it prevents a party from pleading and utilizing the statute of limitation as a bar, although the time limit of the statute may have already run. J.R. Simplot Co. v. Chemetics Int'l, Inc., 126 Idaho 532, 887 P.2d 1039 (1994).

Extension in Writing and Part Payment.

A suit to foreclose a real estate mortgage, commenced within four years after the time of payment of the balance of the mortgage fixed by a written extension agreement, and about the same length of time after the making of certain payments on the mortgage, was not barred by this provision. Union Cent. Life Ins. Co. v. Nielson, 62 Idaho 483, 114 P.2d 252 (1941).

Foreclosure of Mortgage.

Cause of action for foreclosure of mortgage based on option provided for in acceleration clause accrues on exercise of option and not upon default. Union Cent. Life Ins. Co. v. Keith, 58 Idaho 471, 74 P.2d 699 (1937).

Insurance Contract.

Statutory amendment by implication is disfavored and will not be inferred absent clear legislative intent; accordingly, the legislature, by providing in § 41-2401 that no fire insurer shall issue fire insurance on a form other than the "New York Standard as Revised in 1943," did not intend to amend the general five-year statute of limitations upon actions brought upon written contracts and did not create a one-year statute of limitations with respect to actions on policies of fire insurance. Sunshine Mining Co. v. Allendale Mut. Ins. Co., 107 Idaho 25, 684 P.2d 1002 (1984).

Section 41-2401 requires that fire insurers issue policies only on the New York standard form as revised in 1943; the form includes a clause specifying a 12-month limitation period for claims. However, this section establishes a five-year statute of limitation for contracts, including insurance policies, and § 29-110 prohibits any condition in a contract that would reduce that period; thus, the applicable limitations period for the commencement of a suit for reimbursement was five years. Industrial Indem. Ins. Co. v. United States, 757 F.2d 982 (9th Cir. 1985).

Interruption of Running of Statute.

Payment of interest and agreement to postpone payment of mortgage on community property, executed by husband alone, is sufficient to take mortgage out of statute of limitations. Cook v. Stellmon, 43 Idaho 433, 251 P. 957 (1927).

Where statute of limitations is tolled against note secured by real estate mortgage, mortgage lien thereon stands unimpaired. Cook v. Stellmon, 43 Idaho 433, 251 P. 957 (1927).

Where plaintiff's cross-complaint against intervenor made no reference to the commencement of the action or filing of the complaint in intervention and failed to plead any facts tolling the running of the statute, it was too late if filed after statute had run against the claim being sued on. Denton v. Detweiler, 48 Idaho 369, 282 P. 82 (1929).

The statute of limitations runs in favor of a debtor only when he is actually in the state and is tolled as soon as he leaves the state. Roberts v. Hudson, 49 Idaho 132, 286 P. 364 (1930).

A written approval by the debtor of the report of the lender showing advances and

loans made and reciting that none of the advances or loans have been repaid constituted an "acknowledgment" that the loans had not been repaid and of the continuing indebtedness, so that the statute of limitations began to run anew on the date of such acknowledgment. Cummings v. Langroise, 36 F. Supp. 174 (D. Idaho 1940), aff'd 123 F.2d 969 (9th Cir. 1941), cert. denied, 316 U.S. 664, 62 S. Ct. 944, 86 L. Ed. 1741 (1942).

The application of the receipts from a foreclosure sale of mortgage securities does not toll the statute of limitations. American Mut. Bldg. & Loan Co. v. Kesler, 64 Idaho 799, 137 P.2d 960 (1943).

Where the defendants defaulted on a promissory note on September 13, 1967, and an action thereon was commenced on June 21, 1973, such action was not barred by this section since the defendants' absence from the state from 1968 to date of trial tolled the statute of limitations. Jones v. Watson, 98 Idaho 606, 570 P.2d 284 (1977).

Irrigation District Warrants.

Statute of limitations runs against warrants issued by an irrigation district both in an action to place the warrants in judgment or in a mandamus proceeding. Tingwall v. King Hill Irrigation Dist., 66 Idaho 76, 155 P.2d 605 (1945).

Mandamus Action to Compel Reassessment.

Where a mandamus to compel reassessment of property within a special or local improvement district was brought some eighteen months after actual notice of the deficiency through the city clerk's fault, the action was not barred by limitation. Maguire v. Whillock, 63 Idaho 630, 124 P.2d 248 (1942).

Mortgages.

Record notice of existence and nonpayment of mortgage does not entitle purchaser of mortgaged land to quiet title as against mortgagee though debt is barred by limitation period, if purchaser is in privity with original mortgagor and knows that mortgage in fact has not been paid. Trusty v. Ray, 73 Idaho 232, 249 P.2d 814 (1952).

Mortgage Securing Note Barred by Limitations not Admissible in Evidence.

In a mortgagor's action against the third party to recover mortgaged property, the exclusion of authenticated copies of a chattel mortgage and an assignment, offered in evidence on the question of damages to show that the property could not be removed from the county without the mortgagee's consent, was not error, where the notes secured by the mortgages were apparently barred by the statute of limitations. Huron Holding Corp. v. Lincoln Mine Operating Co., 101 F.2d 458 (9th Cir. 1939).

Partial Payment of Debt.

The limitations period can be extended by an obligor who makes a partial payment after the note is due, as such partial payment is deemed equivalent to a new promise by the obligor to satisfy the debt. Thomson v. Sunny Ridge Village Partnership, 118 Idaho 330, 796 P.2d 539 (Ct. App. 1990).

The time period prescribed in a statute of limitations was not extended with respect to one obligor on a note as a result of partial payments made by a co-maker after the note had gone into default. Thomson v. Sunny Ridge Village Partnership, 118 Idaho 330, 796 P.2d 539 (Ct. App. 1990).

Because § 5-238 treats a payment of interest as the equivalent of a new promise, and because a promise binds only the person making it, a partial payment should extend a statutory period of limitation only as to the person who makes the payment. Certain exceptions do exist, however, and they include when a nonpaying co-debtor directs or requests that the payment be made, authorizes or consents to the payment, or ratifies such payment. Thomson v. Sunny Ridge Village Partnership, 118 Idaho 330, 796 P.2d 539 (Ct. App. 1990).

Where an ex-husband failed to make payments on a promissory note, the statute of limitations did not bar the ex-wife's breach of contract claim, because the ex-husband's payment of interest or principal served to restart the statute on all of the installments. Horkley v. Horkley, 144 Idaho 879, 173 P.3d 1138 (2007).

Patent License Agreements.

This section also governs enforcement of patent license agreements. H.M. Chase Corp. v. Idaho Potato Processors, Inc., 96 Idaho 398, 529 P.2d 1270 (1974).

Pleading and Practice.

The statute of limitations is a personal privilege, and, to be made available, must be pleaded; it can not be interposed by argument or inference. Frantz v. Idaho Artesian Well & Drilling Co., 5 Idaho 71, 46 P. 1026 (1896).

Renewal of Promise to Pay.

Evidence adequately supported the court's conclusion that the promise to pay had been renewed by an interest payment, where the trial judge was persuaded that alterations on the face of the exhibits were made in response to the promisor's directions; therefore, the action on the note was not barred by the five-year limitation period prescribed by this section. Modern Mills, Inc. v. Havens, 112 Idaho 1101, 739 P.2d 400 (Ct. App. 1987).

Repair Doctrine.

The "repair doctrine" bars a contractor or vendor of faulty goods, who has discouraged

the owner or purchaser from filing suit until the applicable statutes of limitation have run, from utilizing the statutes of limitations as a defense; such doctrine has not been subscribed to either as a version of equitable estoppel or an alternative means of barring or tolling a statute of limitations defense by the courts of Idaho. J.R. Simplot Co. v. Chemetics Int'l, Inc., 126 Idaho 532, 887 P.2d 1039 (1994).

Retirement Benefits.

Where employer insured employee's life, the policies to vest in employee if employer went out of business, these benefits were not attributed to, or earned in, a specific pay period, but were earned over the entire course of the employment relationship, and § 45-608 applies to an action to recover retirement benefits such as those in this case. Latham v. Haney Seed Co., 119 Idaho 412, 807 P.2d 630 (1991).

School District Warrants.

The statute of limitation applicable to a bank's action against a school district for moneys advanced in payment of school warrants, issued against taxes on lands within the district, was suspended by a moratorium act extending time for payment of delinquent taxes and redemption of lands from tax liens. American Nat'l Bank v. Joint Indep. Sch. Dist. No. 9, 61 Idaho 405, 102 P.2d 826 (1940).

Set-off of Funds.

A credit union's exercise of its "self-help" right of set-off contained in the pledge agreement with the plaintiff and her husband did not require any court action to accomplish, and, accordingly, the statute of limitations was not implicated when the credit union set off funds deposited with it against defaulted loans of the husband. Smith v. Idaho State Univ. Fed. Credit Union, 114 Idaho 680, 760 P.2d 19 (1988).

State Not Within Section.

Under Idaho Const., art. 9, § 5 and Admission Act of July 3, 1892, §§ 3 and 4, the state is exempt from the operation of this section as regards loans made from the permanent school funds. United States v. Fenton, 27 F. Supp. 816 (D. Idaho 1939); State v. Peterson, 61 Idaho 50, 97 P.2d 603 (1939) (Decided prior to 1939 amendment).

Stock Subscriptions.

General statute of limitations applies to actions for recovery of unpaid subscriptions for corporate stock. Ellis v. Capps, 46 Idaho 606, 269 P. 597 (1928).

An action by a corporation to recover a subscription for stock, payable in two instalments, begun more than five years after the first instalment was due was barred as to such instalment. Cassia Creek Reservoir Co. v. Harper, 91 Idaho 488, 426 P.2d 209 (1967).

Surety's Right of Reimbursement.

Right of action of a surety to recover reimbursement from his principal, which accrues when the surety pays the debt, and the obligation of the principal to repay the surety is not founded upon a written instrument within this section. Tritthart v. Tritthart, 24 Idaho 186, 133 P. 121 (1913).

Tort Claim.

Where water heater was installed in home pursuant to contract and, 18 years later, heater exploded, an action by homeowner alleging misfeasance in installation of water heater was a claim in tort, not contract, and statutes of limitations relating to contracts did not apply. Galbraith v. Vangas, Inc., 103 Idaho 912, 655 P.2d 119 (Ct. App. 1982).

Cited in: Schneider v. Hussey, 2 Idaho 8, 1 P. 343 (1881); Ada County v. Ellis, 5 Idaho 333, 48 P. 1071 (1897); Aikens v. Wilson, 7 Idaho 12, 59 P. 932 (1900); Gray v. Pierson, 7 Idaho 540, 64 P. 233 (1901); Gwinn v. Melvin, 9 Idaho 202, 72 P. 961 (1903); Vollmer v. Reid's Estate, 10 Idaho 196, 77 P. 325 (1904); Western Loan & Sav. Co. v. Smith, 12 Idaho 94, 85 P. 1084 (1906); Kessler v. Pruitt, 14 Idaho 175, 93 P. 965 (1908); Miller v. Lewiston Nat'l Bank, 18 Idaho 124, 108 P. 901 (1910); Dern v. Olsen, 18 Idaho 358, 110 P. 164 (1910); Bates v. Capital State Bank, 18 Idaho 429, 110 P. 277 (1910); Bashor v. Beloit, 20 Idaho 592, 119 P. 55 (1911); Anthes v. Anthes, 21 Idaho 305, 121 P. 553 (1912); Gaffney v. Royal Neighbors of Am., 31 Idaho 549, 174 P. 1014 (1918); Moody v. Morris-Roberts Co., 38 Idaho 414, 226 P. 278 (1923); MacLeod v. Stelle, 43 Idaho 64, 249 P. 254 (1926); Palmer v. Maney, 45 Idaho 731, 266 P. 424 (1928); King v. Mattingly, 49 Idaho 618, 292 P. 220 (1930); McMillan v. Sproat, 51 Idaho 236, 4 P.2d 899 (1931); Cummings v. Lowe, 52 Idaho 1, 10 P.2d 1059 (1932); Fishback v. Jensen, 52 Idaho 61, 11 P.2d 361 (1932); Holland Bank v. Brockman, 52 Idaho 324, 14 P.2d 621 (1932); State Ins. Fund v. Hunt, 52 Idaho 639, 17 P.2d 354 (1932); Caldwell v. McKenna, 54 Idaho 552, 33 P.2d 366 (1934); Edminster v. Van Eaton, 57 Idaho 115, 63 P.2d 154 (1936); First Trust & Sav. Bank v. Randall, 57 Idaho 126, 63 P.2d 157 (1936); Poage v. Cooperative Publishing Co., 57 Idaho 561, 66 P.2d 1119 (1937); First Trust & Sav. Bank v. Randall, 59 Idaho 705, 89 P.2d 741 (1939); In re Felton, 60 Idaho 540, 94 P.2d 166 (1939); Cottle v. Oregon Mut. Life Ins. Co., 60 Idaho 628, 94 P.2d 1079 (1939); Dufrense v. Hammersten, 61 Idaho 714, 106 P.2d 861 (1940); American Nat'l Bank v. Joint Indep. Sch. Dist. No. 9, 64 Idaho 691, 136 P.2d 976 (1943); Horn v. Cornwall, 65 Idaho 115, 139 P.2d 757 (1943); Stone v. Webster, 65 Idaho 52, 139 P.2d 479 (1943);

Brown v. Deck, 65 Idaho 710, 152 P.2d 587 (1944); Watkins v. Watkins, 76 Idaho 316, 281 P.2d 1057 (1955); Staten v. Weiss, 78 Idaho 616, 308 P.2d 1021 (1957); Mitchell v. Flandro, 95 Idaho 228, 506 P.2d 455 (1973); Stewart v. Hood Corp., 95 Idaho 198, 506 P.2d 95 (1973); Salmon Rivers Sportsman Camps, Inc. v. Cessna Aircraft Co., 97 Idaho 348, 544 P.2d 306 (1975); Twin Falls Clinic & Hosp. Bldg. Corp. v. Hamill, 103 Idaho 19, 644 P.2d 341 (1982); Landis v. Hodgson, 109 Idaho 252, 706 P.2d 1363 (Ct. App. 1985); Hibbler v. Fisher, 109 Idaho 1007, 712 P.2d 708 (Ct. App. 1985); Mack Fin. Corp. v. Smith, 111 Idaho 8, 720 P.2d 191 (1986); Frieberger v. American Triticale, Inc., 120 Idaho 239, 815 P.2d 437 (1991); Thompson v. Ebbert, 144 Idaho 315, 160 P.3d 754 (2007); Cuevas v. Barraza, 146 Idaho 511, 198 P.3d 740 (Ct. App. 2008).

RESEARCH REFERENCES

Am. Jur. — 51 Am. Jur. 2d, Limitation of Actions, §§ 134 to 136, 138, 140, 141, 160 to 166.

C.J.S. — 54 C.J.S., Limitations of Actions, § 85 et seq.

A.L.R. — Validity of contractual time period shorter than statute of limitations for bringing action. 6 A.L.R.3d 1197.

Choice of law as to applicable statute of limitations in contract acts. 78 A.L.R.3d 639.

Validity of contractual provisions establishing period of limitation longer than that provided by statute of limitations. 84 A.L.R.3d 1172.

5-217. Action on oral contract. — Within four (4) years:

An action upon a contract, obligation or liability not founded upon an instrument of writing.

History.

C.C.P. 1881, § 157; R.S., R.C., & C.L., § 4053; C.S., § 6610; I.C.A., § 5-217.

JUDICIAL DECISIONS

Analysis

Actions by county.
Application of section.
Approval of administrator's account not collaterally attacked.
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Malpractice action.
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Pleading and practice.
Privity of contract.
Proof required.
Unjust enrichment.
Written or oral contract.

Actions by County.

An action by a county to recover from the clerk of court, auditor and recorder moneys illegally allowed by the county commissioners to the clerk and fees illegally collected by the clerk from the county is barred after four years. Bannock County v. Bell, 8 Idaho 1, 65 P. 710 (1901).

An action by the county to recover from one who has not paid for recording instruments the full amount of fees prescribed by statute is not an action upon a liability created by statute but an action "upon a contract, obligation or liability, not founded upon an instrument of writing." Lincoln County v. Twin Falls N. Side Land & Water Co., 23 Idaho 433, 130 P. 788 (1913).

Application of Section.

This section is applicable to an action by one of several cosureties who has paid the principal debt, to enforce contribution. Bell v. Morton, 38 Idaho 758, 225 P. 137 (1924).

This section is not applicable to action to

recover deposit which bank credited on depositor's note. Prewett v. First Nat'l Bank, 45 Idaho 451, 262 P. 1057 (1928).

Action brought within four years from entry of last item on account for services as a farm laborer was not barred. McCarthy v. Paris, 46 Idaho 165, 267 P. 232 (1928).

An action to recover amount due on an oral subscription to corporate stock is governed by this section. Ellis v. Capps, 46 Idaho 606, 269 P. 597 (1928).

The general rule is that the defense of the statute of limitations is not available during the pendency of the action unless the claim was barred when the action was commenced. Oregon S.L.R.R. v. Ballantyne, 48 Idaho 351, 282 P. 80 (1929).

Surety on stay bond, paying deficiency judgment after foreclosure sale, became subrogated to rights of judgment creditor and is governed by § 5-215 instead of by this section. Great Am. Indem. Co. v. Bisbee, 59 Idaho 18, 79 P.2d 1037 (1938).

When purchaser sought to recover down payment alleging vendor's false representation respecting payments due on mortgage, the basis of the action was fraud and the suit was governed by the 3 year statute of limitations for fraud rather than the 4 year statute applicable to contracts not founded on writings. Thomas v. Gordon, 68 Idaho 254, 192 P.2d 856 (1948).

Counterclaim by corporation to recover damages from officer of corporation for breach of trust is not controlled by 3 year statute set forth in § 5-218 but is governed by four year statutes set forth in this section and § 5-224. Melgard v. Moscow Idaho Seed Co., 73 Idaho 265, 251 P.2d 546 (1952).

Where both complaint and defendant's counterclaim were based on a logging contract, defendant's cross demands could be pleaded defensively; therefore, the striking of defendant's counterclaims was erroneous, as they were not barred by the statute of limitations under this section or § 5-224. Kelson v. Ahlborn, 87 Idaho 519, 393 P.2d 578 (1964).

If there had been an oral contract permitting use of patent for dehydrated potato powder, cause of action for its breach occurred not later than 1954 and was barred at time of suit in 1960. Templeton Patents, Ltd. v. J.R. Simplot Co., 336 F.2d 261 (9th Cir. 1964).

Patent owner's claim of unjust enrichment was for value conferred through disclosures and assistance to alleged infringer more than four years before the action in quasi-contract; therefore, such action was barred. Templeton Patents, Ltd. v. J.R. Simplot Co., 336 F.2d 261 (9th Cir. 1964).

Assuming that there had been a contract which permitted defendant to use patents to produce dehydrated potato powder, since evidence reveals plaintiff allowed defendant to produce potato powder and benefit from alleged technical information for nine years before instituting suit, the action for breach was barred by the four-year statute of limitations. Templeton Patents, Ltd. v. J.R. Simplot Co., 220 F. Supp. 48 (D. Idaho 1963), aff'd, 336 F.2d 261 (9th Cir. 1964).

Where it was more than four years prior to commencement of action for unjust enrichment that patent owner supplied certain technical information which aided the alleged infringer to produce dehydrated potatoes by use of patented process, action by patent owner for damages was barred by limitations. Templeton Patents, Ltd. v. J.R. Simplot Co., 220 F. Supp. 48 (D. Idaho 1963), aff'd, 336 F.2d 261 (9th Cir. 1964).

Refusal to allow amendment of complaint to foreclose contractor's lien by adding a cause of action for quantum meruit, where more than four and one-half years had elapsed since the performance of the alleged extra work and the extra work was independent of the original contracts, was proper inasmuch as the four year statute of limitations was applicable to the cause of action for quantum meruit. Mitchell v. Flandro, 95 Idaho 228, 506 P.2d 455 (1973).

In June 1971, the defendants were not certified public accountants, and, at that time, they clearly were not engaged in professional services for which they were licensed; therefore, the alleged acts of malpractice of the defendants cannot be denominated as of June, 1971, to be professional malpractice; hence, the two-year limitation period is inapplicable to the causes of action against them relating to that fiscal year (1970); rather the applicable statute of limitations would be the four year period of either this section or § 5-224. Owyhee County v. Rife, 100 Idaho 91, 593 P.2d 995 (1979).

Where water heater was installed in home pursuant to contract and, 18 years later, heater exploded, an action by homeowner alleging misfeasance in installation of water heater was a claim in tort, not contract, and statutes of limitations relating to contracts did not apply. Galbraith v. Vangas, Inc., 103 Idaho 912, 655 P.2d 119 (Ct. App. 1982).

Where the dissolution of the partnership occurred more than four years prior to the filing of the complaint, the statute of limitation barred plaintiff's cause of action for an accounting of his partnership interest. D.A.R., Inc. v. Sheffer, 134 Idaho 141, 997 P.2d 602 (2000).

Approval of Administrator's Account not Collaterally Attacked.

Where an administrator's payments of interest on mortgage indebtedness were approved by the probate court and the administrator's account, including the final account,

acknowledged liability on the note and mortgage, the order settling the final account and distributing the realty involved subject to the lien of the mortgage, which order was permitted to become final by a lapse of time, was conclusive on the validity of the mortgage and could not be collaterally attacked on the ground that the note and mortgage were barred by the statute of limitations. Horn v. Cornwall, 65 Idaho 115, 139 P.2d 757 (1943).

Burden of Proof.

Party alleging statute of limitations as a defense has the burden of proof. Pauley v. Salmon River Lumber Co., Inc., 74 Idaho 483, 264 P.2d 466 (1953).

Claims Against State.

A contract claim against the state will be deemed barred by the statute of limitations in a proceeding in the supreme court for a recommendatory decision advising the payment of such claim where the same is over ten (10) years past due and no excuse is shown for the delay of the claimant in presenting it. Small v. State, 10 Idaho 1, 76 P. 765 (1904).

Commencement of Running of Statute.

Statute begins to run against warrantholder when his cause of action accrues. Little v. Emmett Irrigation Dist., 45 Idaho 485, 263 P. 40 (1928).

Where employment is continuous for indefinite term without time of payment being specified, statute does not begin to run until service ends. McCarthy v. Paris, 46 Idaho 165, 267 P. 232 (1928).

Where demand is necessary to set statute running, question as to what is reasonable time for making demand must depend upon particular circumstances of case. Johnston v. Keefer, 48 Idaho 42, 280 P. 324 (1929).

Action against trustee for repudiation of trust accrues upon discovery of repudiation. Cruzen v. Boise City, 58 Idaho 406, 74 P.2d 1037 (1937).

Claim for services rendered by plaintiff in caring for testator and for his property during his lifetime was not barred until four years after testator's death. Hubbard v. Ball, 59 Idaho 78, 81 P.2d 73 (1938).

In suit for specific performance of oral contract for purchase of mother's farm by the plaintiff upon which plaintiff had made substantial improvements, the trial court was not required to make a finding relative to statute of limitations pleaded as a defense to the oral contract since plaintiff's right for recovery for improvements did not accrue until after mother repudiated the oral contract of purchase. Watkins v. Watkins, 76 Idaho 316, 281 P.2d 1057 (1955).

An amendment to a complaint alleging partner to be continuing business to date though preventing appellant partner from active participation considered in conjunction with other material facts alleged would clearly state facts sufficient to constitute a cause of action not barred by the statute of limitations as set out in § 5-216 or this section. Markstaller v. Markstaller, 80 Idaho 129, 326 P.2d 994 (1958).

Legal malpractice cause of action brought by decedent's sons in 1974 in regard to probate of father's estate in 1954 accrued in 1954 at the time of the alleged negligence, rather than in 1972, when the alleged negligence was discovered; thus, whether the limitation in § 5-224 or this section was applicable, the action was barred, having been brought more than four years after its occurrence. Martin v. Clements, 98 Idaho 906, 575 P.2d 885 (1978).

The cause of action for an accountant's malpractice for each fiscal year first accrued at the time of the actual occurrence of the illegal acts of malpractice, rather than the date when the auditors first discovered the defalcations. Owyhee County v. Rife, 100 Idaho 91, 593 P.2d 995 (1979).

Since the alleged promise of seller that certain property adjoining that of purchasers would be reserved for common use was not a lien or encumbrance, order of bankruptcy court authorizing sale of part of such property "free and clear of all liens and encumbrances" did not put the purchasers on notice of fraud and did not start the statute of limitations running on purchasers' action to enforce the promise. Middlekauff v. Lake Cascade, Inc., 103 Idaho 832, 654 P.2d 1385 (1982).

Where the parties to an alleged oral agreement concerning the restoration and repair of a vintage automobile failed to reach any agreement as to the particular work to be performed, the time frame within which the restoration would be completed, or the dates when any payments would be due, the entire course of dealings between the parties involving the restoration of the vehicle constituted a single transaction, and a cause of action on the alleged agreement did not accrue until all of the work was completed and the automobile was ready to be picked up. Anderson v. Schwegel, 118 Idaho 362, 796 P.2d 1035 (Ct. App. 1990).

The statute of limitations does not begin to run until a claim accrues upon the breach of contract and, as sufficient and competent evidence to support a finding of breach was not available until 1988 when evidence of discovery of logging and the listing of the property for sale became apparent, there was substantial evidence to present the issue to the jury. Spence v. Howell, 126 Idaho 763, 890 P.2d 714 (1995).

The plaintiffs' claim for specific performance of an agreement to convey real property was not barred by the statute of limitations where the statute did not begin to run

until mortgages or loans encumbrancing the property at issue were extinguished, thereby fulfilling a condition in the agreement and requiring the defendant to convey the property. Simons v. Simons, 134 Idaho 824, 11 P.3d 20 (2000).

Constructive Trust.

Any claim by the beneficiary of decedent's life insurance policy for a constructive trust accrued at the time the insurance policy proceeds were distributed, and, where the claim was not filed until five years later, the claim was barred by the four year limitation contained in either § 5-224 or this section. Witt v. Jones, 111 Idaho 165, 722 P.2d 474 (1986).

Counterclaims.

Although the four-year statute of limitation for an action on an oral contract under this section and the three-year period of limitation for an action for relief on the ground of fraud under § 5-218 would not apply to a purely defensive counterclaim, they would apply to a counterclaim insofar as it seeks a sum in excess of the amount pleaded in the complaint. Full Circle, Inc. v. Schelling, 108 Idaho 634, 701 P.2d 254 (Ct. App. 1985).

Effect of Section.

The effect of this section is merely to bar the remedy, and not to raise a presumption of payment. Miller v. Monroe, 50 Idaho 726, 300 P. 362 (1931).

Court will not quiet title against lien unless debt secured thereby has been paid or statutory presumption of payment has arisen, although action on the debt is barred. Miller v. Monroe, 50 Idaho 726, 300 P. 362 (1931).

Malpractice Action.

A cause of action presented in malpractice is not a contract action; the gist of a malpractice action is negligence, not a breach of contract of employment. Ogle v. De Sano, 107 Idaho 872, 693 P.2d 1074 (Ct. App. 1984).

Mandamus Action to Compel Reassessment.

Where a mandamus to compel reassessment of property within a special or local improvement district was brought some eighteen (18) months after actual notice of the deficiency through the city clerk's fault, the action was not barred by limitation. Maguire v. Whillock, 63 Idaho 630, 124 P.2d 248 (1942).

Pleading and Practice.

Where a cause of action is stated and the answer pleads the bar of the statute of limitations, it is error to enter judgment in favor of defendant on the pleadings, even though it should be barred as shown on the face of the complaint. Chemung Mining Co. v. Hanley, 9 Idaho 786, 77 P. 226 (1904); McLeod v. Rogers, 28 Idaho 412, 154 P. 970 (1916).

The statute must be specially pleaded and can not be raised by general demurrer on the ground that the complaint does not state facts sufficient to constitute a cause of action. Chemung Mining Co. v. Hanley, 9 Idaho 786, 77 P. 226 (1904).

Privity of Contract.

Privity of contract is a prerequisite for recovery of economic loss on the grounds of implied warranty. Salmon Rivers Sportsman Camps, Inc. v. Cessna Aircraft Co., 97 Idaho 348, 544 P.2d 306 (1975).

Proof Required.

Where the defendant raised the oral-contract statute of limitation in his answer to claim, nothing more was required to prove the defense, as the plaintiff's case-in-chief included evidence of the date of each item charged; therefore, the issue was not barred from consideration on appeal. Modern Mills, Inc. v. Havens, 112 Idaho 1101, 739 P.2d 400 (Ct. App. 1987).

Unjust Enrichment.

An action based on the theory of unjust enrichment presupposes an obligation which is implied by law and is not a true contract; however, it partakes of the nature of a contract and is governed by the statute of limitations applicable to oral contracts. Templeton Patents, Ltd. v. J.R. Simplot Co., 220 F. Supp. 48 (D. Idaho 1963), aff'd, 336 F.2d 261 (9th Cir. 1964).

Written or Oral Contract.

A principal's obligation to reimburse a surety who has paid the debt is not founded upon a written instrument within the meaning of the statute of limitations. Tritthart v. Tritthart, 24 Idaho 186, 133 P. 121 (1913).

Cited in: Gwinn v. Melvin, 9 Idaho 202, 72 P. 961 (1903); Bates v. Capital State Bank, 18 Idaho 429, 110 P. 277 (1910); Bashor v. Beloit, 20 Idaho 592, 119 P. 55 (1911); Hillock v. Idaho Title & Trust Co., 22 Idaho 440, 126 P. 612 (1912); Davis v. State, 30 Idaho 137, 163 P. 373 (1917); Boise Dev. Co. v. Boise City, 30 Idaho 675, 167 P. 1032 (1917); Weil v. Defenbach, 31 Idaho 258, 170 P. 103 (1918); Weil v. Defenbach, 36 Idaho 37, 208 P. 1025 (1922); MacLeod v. Stelle, 43 Idaho 64, 249 P. 254 (1926); Davenport v. Bird, 45 Idaho 280, 261 P. 769 (1927); Nelson v. Bruce, 51 Idaho 378, 6 P.2d 140 (1931); Common School Dist. No. 18 v. Twin Falls State Bank & Trust Co., 52 Idaho 200, 12 P.2d 774 (1932); Trimming v. Howard, 52 Idaho 412, 16 P.2d 661 (1932); State Ins. Fund v. Hunt, 52 Idaho 639, 17 P.2d 354 (1932); Doolittle v. Eckert, 53 Idaho 384, 24 P.2d 36 (1933); Commercial Cas. Ins. Co. v. Boise City Nat'l Bank, 61 Idaho 124, 98 P.2d 637 (1940); Fidelity Trust Co. v. State, 72 Idaho 137, 237 P.2d 1058 (1951); Dickerson v.

Brewster, 88 Idaho 330, 399 P.2d 407 (1965); Joseph v. Darrar, 93 Idaho 762, 472 P.2d 328 (1970); Ramseyer v. Ramseyer, 98 Idaho 47, 558 P.2d 76 (1976); Heileson v. Cook, 108 Idaho 236, 697 P.2d 1250 (Ct. App. 1985); Kugler v. Northwest Aviation, Inc., 108 Idaho 884, 702 P.2d 922 (Ct. App. 1985); Hibbler v. Fisher, 109 Idaho 1007, 712 P.2d 708 (Ct. App. 1985); Harkness v. City of Burley, 110 Idaho 353, 715 P.2d 1283 (1986); Mack Fin. Corp. v. Smith, 111 Idaho 8, 720 P.2d 191 (1986); First Bank & Trust v. Jones, 111 Idaho 481, 725 P.2d 186 (Ct. App. 1986); Anderton v. Herrington, 113 Idaho 73, 741 P.2d 360 (Ct. App. 1987); Callenders, Inc. v. Beckman, 120 Idaho 169, 814 P.2d 429 (Ct. App. 1991); Frieberger v. American Triticale, Inc., 120 Idaho 239, 815 P.2d 437 (1991); Balivi Chem. Corp. v. Industrial Ventilation, Inc., 131 Idaho 449, 958 P.2d 606 (Ct. App. 1998); Eagle Water Co. v. Roundy Pole Fence Co., 134 Idaho 626, 7 P.3d 1103 (2000).

RESEARCH REFERENCES

Am. Jur. — 51 Am. Jur. 2d, Limitation of Actions, §§ 136, 139, 142, 144 to 146, 160 to 166.

C.J.S. — 54 C.J.S., Limitations of Actions, § 91 et seq.

5-218. Statutory liabilities, trespass, trover, replevin, and fraud. — Within three (3) years:

1. An action upon a liability created by statute, other than a penalty or forfeiture. The cause of action in favor of the state of Idaho or any political subdivision thereof, upon a surety bond or undertaking provided for or required by statute shall not be deemed to have accrued against any surety on such bond or undertaking until the discovery by the state of Idaho or any political subdivision thereof of the facts constituting the liability.

2. An action for trespass upon real property.

3. An action for taking, detaining or injuring any goods or chattels, including actions for the specific recovery of personal property.

4. An action for relief on the ground of fraud or mistake. The cause of action in such case not to be deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud or mistake.

History.
C.C.P. 1881, § 158; R.S., R.C., & C.L., § 4054; C.S., § 6611; I.C.A., § 5-218; am. 1974, ch. 240, § 2, p. 1603.

STATUTORY NOTES

Compiler's Notes.
Section 1 of S.L. 1974, ch. 240, provided: "The purpose of this act is to clarify the law with respect to the statute of limitations applied to bonds of public officials."

Effective Dates.
Section 3 of S.L. 1974, ch. 240, provided: "An emergency existing therefor, which emergency is hereby declared to exist, this act shall be in full force and effect on and after its passage and approval, and shall apply to all causes of action against any surety on any such bond or undertaking, which said causes of action shall have been discovered by the state of Idaho or any political subdivision thereof within three (3) years immediately preceding the date of passage and approval of this act." Approved April 3, 1974.

JUDICIAL DECISIONS

ANALYSIS

Amendment of complaint.
Application in general.
—Action to quiet title.
—Bank deposits.
—Delinquent property taxes.

Amendment of Complaint.

Where, in an action for damage to mining ground caused by grease and oil deposited in stream, the original complaint contained general allegations applicable to the undredged portions of the claims as well as to the portions which had been dredged, an amended complaint specifically alleging damage to the undredged portions did not state a new cause of action with respect to the running of the statute of limitations. Idaho Gold Dredging Corp. v. Boise Payette Lumber Co., 54 Idaho 765, 37 P.2d 407 (1934).

Application in General.

The statute of limitations does not apply to pure defenses, but only where affirmative relief is sought. Frank v. Davis, 34 Idaho 678, 203 P. 287 (1921).

The statute of limitations is general, is to be liberally construed, and must be applied to all cases where an exception is not specifically made. Mendini v. Milner, 47 Idaho 439, 276 P. 313 (1929).

Statutes of limitations apply both to equity and law cases. Steinour v. Oakley State Bank, 49 Idaho 293, 287 P. 949 (1930).

Action to revive judgment after a failure of title on execution sale was governed by this section. Gertztowt v. Humphrey, 53 Idaho 631, 27 P.2d 64 (1933).

Counterclaim by corporation to recover damages from officer of corporation for breach of trust is not controlled by 3 year statute set forth in this section, but is governed by four year statutes set forth in §§ 5-217, 5-224. Melgard v. Moscow Idaho Seed Co., 73 Idaho 265, 251 P.2d 546 (1952).

When purchaser sought to recover on the case for consequential damages to real property, statute of limitations was not the three year statute for actions of trespass upon real property but the four year statute set forth in § 5-224. Woodland v. Lyon, 78 Idaho 79, 298 P.2d 380 (1956).

In action to recover on surety bonds issued by defendant to warehouseman where intervenor who had given grain to warehouseman to sell to prospective purchaser and, when such sale had not materialized, had received two warehouse receipts from warehouseman made demand on warehouseman for grain on June 25, 1956, but did not bring action until December 17, 1959, such action was barred by

the statute of limitations. United States v. Fireman's Fund Ins. Co., 191 F. Supp. 317 (D. Idaho 1961).

Where a truck was leased in 1969, and damaged in a collision on March 16, 1971, the three year statute on tort claims barred insured lessee's tort claim as of March 16, 1974, and the insurer's claim by subrogation was likewise barred since the subrogee had no greater rights and was subject to the same statute of limitations. May Trucking Co. v. International Harvester Co., 97 Idaho 319, 543 P.2d 1159 (1975).

—Action to Quiet Title.

An action to quiet title and to set aside an alleged void deed was not barred by this section nor any other statute of limitations and summary judgment on this ground was improper. Argyle v. Slemaker, 99 Idaho 544, 585 P.2d 954 (1978).

—Bank Deposits.

A depositor who authorized bank officer to withdraw part of his deposit to invest in a mortgage had a right to demand his deposit on learning that the officer had withdrawn and embezzled the fund and not made the loan, and the bank could not successfully plead the bar of this statute, but could only rely on § 5-223. Carr v. Weiser State Bank, 57 Idaho 599, 66 P.2d 1116 (1937).

—Delinquent Property Taxes.

The time limit for an action for delinquent property taxes is in this section. Childers v. Wolters, 115 Idaho 527, 768 P.2d 790 (Ct. App. 1988).

An action for the collection of delinquent property taxes for the years 1983-1985 which was commenced in 1986 was not time-barred as to the tax owed for any of those years. Childers v. Wolters, 115 Idaho 527, 768 P.2d 790 (Ct. App. 1988).

—Easements.

This section does not apply to actions involving question of easements, since they are real property within meaning of law. Beasley v. Engstrom, 31 Idaho 14, 168 P. 1145 (1917); Last Chance Ditch Co. v. Sawyer, 35 Idaho 61, 204 P. 654 (1922).

—Effect of Amendment.

The 1974 amendment to this section did not create an exception for the discovery of defalcations which occur later than the three-year statute of limitations because the 1974 amendment changed the existing law rather than announcing it since, when a statute is amended, it is presumed to have a meaning different from that accorded to it before the amendment. Lincoln County v. Fidelity & Deposit Co., 102 Idaho 489, 632 P.2d 678 (1981).

—Federal Courts.

While the statute does not apply in bankruptcy proceedings, if a plenary action by the bankrupt against a judgment creditor would have been barred by the statute, the bankrupt should be held barred by the laches from setting up his claim in the bankruptcy proceedings. Pindel v. Holgate, 221 F. 342 (9th Cir. 1915).

Action by trustee in bankruptcy to recover a preferential transfer was governed by federal, and not by state, statute of limitations. Meikle v. Drain, 69 F.2d 290 (9th Cir. 1934).

Although state statute of limitations was not binding on federal court in action for rescission of contract, the court would be guided by it. Oregon Mtg. Co. v. Renner, 96 F.2d 429 (9th Cir. 1938).

Federal court, in applying state statute of limitations, will adopt the interpretation placed on such statute by the highest court of the state in which the cause of action arose. Aker v. Sears, Roebuck & Co., 38 F. Supp. 741 (D. Idaho 1941).

Liability of private persons under the federal civil rights statute, 42 U.S.C. § 1983, was governed by the statute of limitations provided in this section. Gowin v. Altmiller, 455 F. Supp. 743 (D. Idaho 1978), aff'd, 647 F.2d 170 (9th Cir. 1981). But see Idaho State Bar v. Tway, 128 Idaho 794, 919 P.2d 323 (1996).

A civil rights action filed pursuant to 42 U.S.C. § 1983 is an action upon a liability created by statute and, thus, subject to the three-year statute of limitations under this section; however, federal law determines when the limitations period begins to run. Gowin v. Altmiller, 663 F.2d 820 (9th Cir. 1981). But see Idaho State Bar v. Tway, 128 Idaho 794, 919 P.2d 323 (1996).

—Judgment, Actions On.

This section does not govern action on judgment against trustees of defunct corporation. Caxton Printers v. Ulen, 59 Idaho 688, 86 P.2d 468 (1939).

—Malpractice.

Action for malpractice is not based on contract but on negligence and is governed by the two-year statute. Trimming v. Howard, 52 Idaho 412, 16 P.2d 661 (1932).

—Retroactivity of Amendment.

The 1974 legislative amendment to subdivision 1. of this section is not retroactive in its application to January 1974, since a statute is not retroactive under § 73-101 unless expressly so declared, and the only express declaration of retroactivity in this amendment is to causes of action discovered within three years prior to its passage, on April 3, 1974. Lincoln County v. Fidelity & Deposit Co., 102 Idaho 489, 632 P.2d 678 (1981).

—Setoff and Counterclaim.

The statute applies to a sum attempted to be set off. Wonnacott v. Kootenai County, 32 Idaho 342, 182 P. 353 (1919).

This section is not applicable to action to recover deposit which bank credited to depositor's note. Prewett v. First Nat'l Bank, 45 Idaho 451, 262 P. 1057 (1928).

—Wiretapping.

Based on its determination that in the case of wiretapping the damage is immediate, the statute of limitations begins to run no later than the last day of wiretapping. Knudsen v. Agee, 128 Idaho 776, 918 P.2d 1221 (1996).

—Worker's Compensation Claim.

This section has no application to employee's claim for compensation. Eldridge v. Idaho State Penitentiary, 54 Idaho 213, 30 P.2d 781 (1934).

Commencement of Running of Statute.

A proceeding to revive an original judgment does not accrue until the period of redemption has expired. Cantwell v. McPherson, 3 Idaho 721, 34 P. 1095 (1893).

Statute began to run against liability of city treasurer on his bond when he failed to pay over the city's funds when his term of office expired. City of St. Anthony v. Mason, 49 Idaho 717, 291 P. 1067 (1930).

Statute of limitations as to collection of transfer tax began to run upon death of deceased, and was not tolled by the provision thereof that the tax should remain a lien upon real estate upon which it is chargeable until the same is paid. Douglas v. Moscow, 50 Idaho 104, 294 P. 334 (1930).

In cases of periodic flooding, the statute of limitations begins to run from the date of each flooding. Lavin v. Panhandle Lumber Co., 51 Idaho 1, 1 P.2d 186 (1931).

Action by insurance commissioner of state of Washington to recover an assessment levied for defendant's pro rata liability of the indebtedness of an automobile insurance exchange was governed by this section. Fishback v. Jensen, 52 Idaho 61, 11 P.2d 361 (1932).

Motion adopted by highway board that the action of the secretary in purchasing joint stock and land bank bonds, pursuant to instructions of the board, be ratified, and the entry of such motion in the minutes did not set the statute of limitations running against action by the district to recover from members of the board funds of the board. Filer Hwy. Dist. ex rel. Alworth v. Shearer, 54 Idaho 201, 30 P.2d 199 (1934).

Where the plaintiff was arrested in July, 1974 on a criminal complaint of embezzlement and imprisoned for one day before being released on his own recognizance, and following his conviction was again imprisoned, his cause of action under the federal civil rights statute, 42 U.S.C. § 1983 arose at the time of his first imprisonment and the three-year statute of limitations under this section was not tolled, under § 5-230, by his subsequent imprisonment; accordingly, the filing of his civil rights action in August, 1977 was not timely and the action was barred. Gowin v. Altmiller, 663 F.2d 820 (9th Cir. 1981). But see Idaho State Bar v. Tway, 128 Idaho 794, 919 P.2d 323 (1996).

Where county treasurer and tax collector served successive two-year terms of office, an action brought by county to recover under performance bonds due to an official's misappropriation of funds and failure to collect delinquent taxes was barred by the three-year statute of limitations under subdivision 1. of this section where discovery of the misdeeds occurred more than three years after the particular term of office ended, since the action accrued at the end of each individual term of office. Lincoln County v. Fidelity & Deposit Co., 102 Idaho 489, 632 P.2d 678 (1981).

All of the possible dates upon which the running of the statute of limitation could have commenced were more than three years prior to the date when the action was filed; therefore, the action was brought beyond the three-year limitation and should not have been decided on the merits by the magistrate. Jemmett v. McDonald, 135 Idaho 894, 32 P.3d 669 (2001).

Although the business owners argued that a lien filed with the secretary of state under § 72-1360, seeking to enjoin the enforcement of a lien for unpaid unemployment insurance contributions filed by the Idaho department of labor, was the commencement of a civil action, they offered no authority or argument to support that contention; the general statute of limitations did not apply to the issuance of a writ of execution because it was neither an action nor a special proceeding of a civil nature, such that the district court did not err in holding that the filing of the lien was not barred by § 5-218. Beale v. State, 139 Idaho 356, 79 P.3d 715 (2003).

Where the company had sufficient facts to know, or with the exercise of reasonable diligence, should have known of the corporation's alleged fraudulent concealment and fraudulent misrepresentation no later than July 1990, the company's fraudulent concealment and fraudulent misrepresentation claims were barred by the three-year statute of limitations under this section. Nerco Minerals Co. v. Morrison Knudsen Corp., 140 Idaho 144, 90 P.3d 894 (2004).

Enforcement of Public Right.

Where the actions of the department of transportation were consistent with the exer-

cise of its police powers, as authorized by the legislature, their actions were not barred by the statute of limitations, because statutes of limitations do not operate against the state when the state is acting in its sovereign capacity to enforce a public right. Young Elec. Sign Co. v. State ex rel. Winder, 135 Idaho 804, 25 P.3d 117 (2001).

Failure to Cite Particular Section.

Since the particular section of the statute of limitations upon which defendant relied was not designated in the trial court as required under Idaho Civil Procedure Rule 9(h), the availability of this section as a defense was not considered on appeal. Transamerica Ins. Co. v. Widmark, 116 Idaho 7, 773 P.2d 275 (1989).

Fraud.

In dispute between siblings over a failed business partnership, brother failed to state a cause of action for fraud based on sister's false statement that her husband would commit suicide if plaintiffs sued them, because it was too vague and insubstantial to constitute duress, there was opportunity to determine the reality of the threat, the brother was represented by counsel, and the threats of suicide were not representations upon which he could justifiably rely. Country Cove Dev., Inc. v. May, 143 Idaho 595, 150 P.3d 288 (2006).

Jury Theory for Award.

In an action on a counterclaim, where the jury was instructed on the elements necessary for recovery both for breach of contract and for fraud, but the verdict form failed to designate the theory upon which the defendant was entitled to relief, the trial court erred in failing to require the jury to state the theory upon which its award was based, since an award for breach of contract may have exceeded the limitations period imposed by § 28-2-607(3)(a), and an award for fraud may have been time-barred under this section. Instructing the jury to distinguish between the fraud and contract theories would also protect against a forbidden possible double recovery resulting from an award on both theories. Full Circle, Inc. v. Schelling, 108 Idaho 634, 701 P.2d 254 (Ct. App. 1985).

—Pleading or Practice.

A claim which asserted that the attorney's conflict of interest was not properly disclosed did not allege the elements of a cause of action for intentional fraud so as to come within the three-year limitations period of subdivision 4 of this section. Pichon v. Benjamin, 108 Idaho 852, 702 P.2d 890 (Ct. App. 1985).

Pleading and Practice.

Trial court did not err in granting summary judgment for an insurer in an alleged insurance fraud matter, as a letter showed that the insured could have had early knowledge of the claimed fraud and alleged misrepresentations, and the insured failed to contradict, in response to the summary judgment motion, the insurer's assertions, resulting in no factual dispute. McCorkle v. Northwestern Mut. Life Ins. Co., 141 Idaho 550, 112 P.3d 838 (Ct. App. 2005).

Subd. 1. Liabilities Created by Statute.

A statutory liability within the meaning of this subdivision is one that depends for its existence on the enactment of a statute and not on the contract of the parties. Dietrich v. Copeland Lumber Co., 28 Idaho 312, 154 P. 626 (1916).

The phrase, "liability created by statute," means a liability which would not exist but for the statute and does not extend to an action based on the defendant's alleged negligence in addition to the statutory liability, or to an action in which any element of agreement enters, or to a constitutional liability instead of a mere statutory one. Dietrich v. Copeland Lumber Co., 28 Idaho 312, 154 P. 626 (1916).

Action for damages from water-soaking defendants' land was not governed by this section. Muncey v. Security Ins. Co., 43 Idaho 441, 252 P. 870 (1927).

The liability of a trustee is not one created by statute within this section. Cruzen v. Boise City, 58 Idaho 406, 74 P.2d 1037 (1937).

Action against city on local improvement district bonds, based on embezzlement by city clerk of special assessments levied therefor, was not governed by this subdivision, since it arose by reason of defendant's breach of trust rather than by statute. Cruzen v. Boise City, 58 Idaho 406, 74 P.2d 1037 (1937).

—Bond, Action on.

In an action by a surety upon a bond of a bank securing repayment of a city's deposits of public funds for amount allegedly paid in excess of surety's pro rata share of amount due city, three-year limitation on action on liability created by statute other than penalty or forfeiture was inapplicable to a cross-complaint for amount allegedly paid by the receiver of the bank, in excess of the pro rata share chargeable to bonds pledged by bank to secure repayment of deposits. Commercial Cas. Ins. Co. v. Boise City Nat'l Bank, 61 Idaho 124, 98 P.2d 637 (1940).

—Counties, Liabilities of.

When a new county was formed assuming the obligations of the old county, the statute of limitations begins to run from the creation of the new county and not from the maturity of the original debt. Robertson v. Blaine County, 90 F. 63 (9th Cir. 1898).

When one county is carved out of a portion of another and adjustment and settlement of

all accounts is made, the liability of one county to the other is created by statute and an action to enforce such liability must be brought within three years. Canyon County v. Ada County, 5 Idaho 686, 51 P. 748 (1897). See also Blaine County v. Butte County, 45 Idaho 193, 261 P. 338 (1927).

The statute of limitations runs against the county in a civil action brought by the county against an ex-clerk of the district court, who was an ex-officio auditor and recorder of such county, for alleged illegal fees and compensation collected by him from the county during the term of his office. Bannock County v. Bell, 8 Idaho 1, 65 P. 710 (1901).

Action to recover moneys collected by defendant as assessor and tax collector and not paid over to the county was governed by this section. Canyon County ex rel. Griffiths v. Moore, 34 Idaho 732, 203 P. 466 (1921).

In action by one county of state against another upon fixed liability, action must be commenced within three-year limitation provided in this section. Blaine County v. Butte County, 45 Idaho 193, 261 P. 338 (1927).

In city's action against a county for back taxes, the plaintiff city's claims were based on "a liability created by statute," and the three-year statute of limitations contained in subdivision 1 of this section applied. City of Rexburg v. Madison County, 115 Idaho 88, 764 P.2d 838 (1988).

—Public Officers, Liabilities of.

An action against the sureties of an officer to recover an amount allowed to said officer for services after the expiration of his term of office is within the provisions of this section. Ada County v. Ellis, 5 Idaho 333, 48 P. 1071 (1897).

This section has no application to an action by a county to recover balance of fees due for recording of instruments. Lincoln County v. Twin Falls N. Side Land & Water Co., 23 Idaho 433, 130 P. 788 (1913).

Action against assessor to recover because of failure to pay over county money is liability created by statute. Canyon County ex rel. Griffiths v. Moore, 34 Idaho 732, 203 P. 466 (1921).

Action on bond of city treasurer to recover funds deposited without authority in a bank which later failed is an action based on a liability created by statute. City of St. Anthony v. Mason, 49 Idaho 717, 291 P. 1067 (1930).

—Reimbursement of State Support Payments.

Where putative father failed to establish prejudice, one of four elements of his defense of laches in his attempt to defeat state's claim for reimbursement of state's support payments on behalf of minor daughter, subdivision 1 of this section precluded the state from seeking reimbursement for all expenditures, but allowed it to seek reimbursement of expenditures within the three year statute of limitations of this section and allowed for reimbursement of future expenditures. State, Dep't of Health & Welfare ex rel. Washington ex rel. Nicklaus v. Annen, 126 Idaho 691, 889 P.2d 720 (1995).

—Stockholders' Liabilities.

An action against the president and secretary of a corporation based on their statutory liability to answer for its contractual obligations is barred within three years. Dietrich v. Copeland Lumber Co., 28 Idaho 312, 154 P. 626 (1916).

This section is not applicable to action against directors and stockholders of bank for withdrawing assets of the bank. Weil v. Defenbach, 31 Idaho 258, 170 P. 103 (1918). See also Stoltz v. Scott, 23 Idaho 104, 129 P. 340 (1912); Weil v. Defenbach, 36 Idaho 37, 208 P. 1025 (1922); Jenkins v. Standrod, 46 Idaho 614, 269 P. 586 (1928).

Stockholder's liability for corporate indebtedness, to the amount of his unpaid stock subscription, is not a liability created by statute. Jensen v. Aikman, 32 Idaho 261, 181 P. 525 (1919). See also Grimsmoe v. Kendrick, 42 Idaho 491, 247 P. 746 (1926).

—Taxes, Liability for.

Where owner of delinquency tax certificates within one year after board of county commissioners made its order declaring certificates invalid filed action against county, action was not barred by any statute of limitation. Wilson v. Twin Falls County, 47 Idaho 527, 277 P. 1114 (1929).

Where more than three years had elapsed since taxes became delinquent and no facts tolling three-year statute of limitation prescribed by this section were pleaded in action to enforce lien, the action was barred. Lemhi County ex rel. Gilbreath v. Boise Livestock Loan Co., 47 Idaho 712, 278 P. 214 (1929).

Statute of limitations applying to proceeding to collect transfer tax was not tolled by provision that tax should remain lien on real estate until paid. State ex rel. Gallet v. Naylor, 50 Idaho 113, 294 P. 333 (1930).

Where a mandamus to compel reassessment of property within a special or local improvement district was brought some eighteen months after actual notice of the deficiency through the city clerk's fault, the action was not barred by limitation. Maguire v. Whillock, 63 Idaho 630, 124 P.2d 248 (1942).

Subd. 2. Trespass Upon Real Property.

An action for damages for recurrent flooding of agricultural lands by waters polluted with poisonous waste from ore reduction works is not for trespass but on the case, and not limited by this subdivision. Hill v. Empire

State-Idaho Mining & Developing Co., 158 F. 881 (C.C.D. Idaho 1908).

Where a dam causes periodical damage to a sand beach by flooding, the statute does not run from the first as to all recurring floodings. Deffenbaugh v. Washington Water Power Co., 24 Idaho 514, 135 P. 247 (1913).

In action for flooding lands, the statute begins to run when actual damages accrue. Rogers v. Oregon-Washington Ry. & Nav. Co., 28 Idaho 609, 156 P. 98 (1916).

Limitation for action for trespass upon real property has no application to action on the case for consequential damages. Boise Dev. Co. v. Boise City, 30 Idaho 675, 167 P. 1032 (1917).

Action for damages against irrigation company, for water soaking plaintiff's land, is not action for trespass on real property and this section has no application thereto. Munn v. Twin Falls Canal Co., 43 Idaho 198, 252 P. 865 (1926).

Where placing obstructions in defendant's dam caused periodic overflowing of plaintiff's land, statute of limitations began to run from date of each periodic flooding. Lavin v. Panhandle Lumber Co., 51 Idaho 1, 1 P.2d 186 (1931).

The section does not apply to suit for contamination of mining ground, but such suit is governed by § 5-224. Idaho Gold Dredging Corp. v. Boise Payette Lumber Co., 52 Idaho 766, 22 P.2d 147 (1933).

In action against canal company based on injury to lands caused by eroding of land as the result of seasonal rise and fall of water, each annual intermittent destruction of the land constitutes a separate cause of action as respects the statute of limitations. Johnson v. Twin Falls Canal Co., 66 Idaho 660, 167 P.2d 834, cert. denied, 329 U.S. 782, 67 S. Ct. 202, 91 L. Ed. 671 (1946).

Although the statute of limitations precluded recovery for trespass damages incurred in 1981, the statute did not thereby preclude the court from considering the parties' conduct in 1981 when it evaluated damage claims arising in 1987. Bumgarner v. Bumgarner, 124 Idaho 629, 862 P.2d 321 (Ct. App. 1993).

Subd. 3. Detention or Injury to Personal Property.

A right of action accrues in favor of the owner of goods as soon as they are wrongfully taken from his possession, or wrongfully converted by one who rightfully came into possession of them. Havird v. Lung, 19 Idaho 790, 115 P. 930 (1911).

Where the possession of property is acquired by a tort, no demand is necessary prior to the institution of suit for its recovery; consequently the statute of limitations is set in motion without such demand. Havird v. Lung, 19 Idaho 790, 115 P. 930 (1911).

Action for conversion of notes held barred notwithstanding defendant's fraudulent concealment, where plaintiff had not exercised ordinary diligence in discovering right of action. Davis v. Consolidated Wagon & Mach. Co., 43 Idaho 730, 254 P. 523 (1927).

Action to recover bank deposit was not governed by this subdivision, but by § 5-223. Prewett v. First Nat'l Bank, 45 Idaho 451, 262 P. 1057 (1928).

Statute of limitations did not begin to run against attorney's lien until pledgee sold property on which lien was claimed. Hansbrough v. D.W. Standrod & Co., 49 Idaho 216, 286 P. 923 (1930).

The three-year period applies to all actions involving the tortious taking, detaining or injuring of personal property. Common School Dist. No. 18 v. Twin Falls State Bank & Trust Co., 52 Idaho 200, 12 P.2d 774 (1932).

Trover and conversion, whether the complaint sounds in tort or in contract, is barred in three years under this section. Common School Dist. No. 18 v. Twin Falls State Bank & Trust Co., 52 Idaho 200, 12 P.2d 774 (1932).

Action for damage to mining ground caused by grease and oil deposited in stream by defendant was not governed by this subdivision. Idaho Gold Dredging Corp. v. Boise Payette Lumber Co., 52 Idaho 766, 22 P.2d 147 (1933).

In action where it was shown that defendant, in 1934, acquired a cow which was alleged to belong to plaintiff, defendant was guilty of conversion at that time and an action brought in 1946 for conversion was barred by the three-year statute of limitations. Davidson v. Davidson, 68 Idaho 58, 188 P.2d 329 (1947).

Where water heater was installed without pressure release valve and exploded 18 years later, cause of action for damages caused by explosion occurred at the time of the explosion, notwithstanding that plaintiff knew, at the time of installation, of the failure to install the valve, and action brought within one year from explosion was not barred. Galbraith v. Vangas, Inc., 103 Idaho 912, 655 P.2d 119 (Ct. App. 1982).

Where the wrongful labeling occurred, if at all, at the time of the sale of the chemical by the defendant to the former lessees, and such sale was more than three years prior to the filing of the amended complaint, the improper labeling claim was barred under subdivision 3. of this section. Wing v. Martin, 107 Idaho 267, 688 P.2d 1172 (1984).

Subd. 4. Fraud or Mistake.

The provisions of this subdivision have no application to the action for taking, detaining or injuring goods or chattels. Havird v. Lung, 19 Idaho 790, 115 P. 930 (1911).

One who sustains damage by reason of the mistake and false and fraudulent representation contained in an abstract may commence his action to recover damages against the abstracter within three years after discovering the fraud or mistake. Hillock v. Idaho Title & Trust Co., 22 Idaho 440, 126 P. 612 (1912).

The test, under this subdivision, is not whether the fraud or mistake occurred in a contract or independently of contract, but whether the action seeks relief from or on account of fraud or mistake. Hillock v. Idaho Title & Trust Co., 22 Idaho 440, 126 P. 612 (1912).

Where alleged fraud as set out in counterclaim was discovered and known for more than three years before filing an action on note for damages for loss of profits from breach of warranty, such action was barred. Carlson v. Ozmun, 44 Idaho 500, 258 P. 1078 (1927).

Action to recover bank deposit was not governed by this subdivision but by § 5-223. Prewett v. First Nat'l Bank, 45 Idaho 451, 262 P. 1057 (1928).

Complaint showing that bank's action against fraudulent directors was brought within three years after discovery of fraud is not demurrable under this section. Jenkins v. Standrod, 46 Idaho 614, 269 P. 586 (1928).

To bring an action within this section on the ground of fraud in concealing the cause of the injury, fraud must be the substantial cause of action, and the action must rest solely on its proof primarily essential to any relief. Trimming v. Howard, 52 Idaho 412, 16 P.2d 661 (1932).

An action for money due certain school districts as a result of misapportionment of school funds is an action for relief on the ground of "mistake" which did not accrue until a discovery thereof, rather than an action on a "liability created by statute other than a penalty or forfeiture" and not barred where timely brought after such discovery. Independent Sch. Dist. No. 1 v. Common Sch. Dist. No. 1, 56 Idaho 426, 55 P.2d 144 (1936).

The statute is tolled by either undiscovered fraud or undiscovered mistake, the test being whether the action seeks relief on account of fraud or mistake. Independent Sch. Dist. No. 1 v. Common Sch. Dist. No. 1, 56 Idaho 426, 55 P.2d 144 (1936).

Action by one school district against another on account of misappropriation of school funds through error in computations was governed by this subdivision, and not by subdivision 1. Independent Sch. Dist. No. 1 v. Common Sch. Dist. No. 1, 56 Idaho 426, 55 P.2d 144 (1936).

In action by surety on bond of bank, given to secure repayments of city's deposits of public funds, against bank and its receiver, to recover moneys alleged to have been paid by it in excess of its pro rata share of amount due to city where defendants cross-claimed seeking to recover moneys alleged to have been paid by receiver in excess of pro rata share chargeable to bonds pledged by bank to secure repayments of deposit and the last payment was made to the city by the receiver June 4, 1934, and the cross-complaint was filed September 17, 1937, more than three years after respondents discovered the facts constituting the mistake, if there was one, the cause of action stated by the complaint was barred by this subdivision. Commercial Cas. Ins. Co. v. Boise City Nat'l Bank, 61 Idaho 124, 98 P.2d 637 (1940).

An action for damages resulting from an alleged conspiracy to hinder and prevent, by legal proceedings, the collection of a debt owing to the plaintiff was governed by this section, and unless the facts constituting the fraud were not discovered until later, the cause of action was barred three years after accrual. Aker v. Sears, Roebuck & Co., 38 F. Supp. 741 (D. Idaho 1941).

Bondholder's action to compel reassessment in special or local improvement district was governed by this section. Maguire v. Whillock, 63 Idaho 630, 124 P.2d 248 (1942).

When purchaser sought to recover down payment alleging vendor's false representation respecting payments due on mortgage, the basis of the action was fraud and the suit was governed by the 3 year statute of limitations for fraud rather than the 4 year statute applicable to contracts not founded on writing. Thomas v. Gordon, 68 Idaho 254, 192 P.2d 856 (1948).

A party who by fraud prevents others from investigating a public record cannot assert the duty to investigate public records as a defense. Gerlach v. Schultz, 72 Idaho 507, 244 P.2d 1095 (1952).

Defrauded party is not charged with constructive notice of records in estate where administrator fails to reveal true state of facts, since administrator as a fiduciary has the duty to disclose. Gerlach v. Schultz, 72 Idaho 507, 244 P.2d 1095 (1952).

Duty of heirs to investigate records of estate was not sufficient to bar suit by heirs against administrator for fraud in transferring assets of estate to himself, even though suit was not filed within three year statutory period following filing of final report where administrator told heirs who lived outside the state that assets were only sufficient to pay debts of deceased. Gerlach v. Schultz, 72 Idaho 507, 244 P.2d 1095 (1952).

The three year statute of limitations for fraud of subsection 4. of this section applied to action brought by sublessees of desert entry lands against lessors and others for damages and for alleged misrepresentation and was not tolled until the original complaint was

filed so as to bar the action. Stewart v. Hood Corp., 95 Idaho 198, 506 P.2d 95 (1973).

The three year period of limitations prescribed in this section is applicable to an action brought by or for the benefit of the state to recover unemployment benefits fraudulently obtained. Norton v. Department of Emp., 94 Idaho 924, 500 P.2d 825 (1972).

Where fraud could have been discovered through the exercise of reasonable diligence at the time it was alleged to have been committed, an action brought ten (10) years later was barred by this section. Nancy Lee Mines, Inc. v. Harrison, 95 Idaho 546, 511 P.2d 828 (1973).

Although the four-year statute of limitation for an action on an oral contract under this section, and the three-year period of limitation for an action for relief on the ground of fraud under this section would not apply to a purely defensive counterclaim, they would apply to a counterclaim insofar as it seeks a sum in excess of the amount pleaded in the complaint. Full Circle, Inc. v. Schelling, 108 Idaho 634, 701 P.2d 254 (Ct. App. 1985).

—Action Against Professional.

Where the plaintiffs were attempting to recover on a contract to which it was not shown they were a party, and where the plaintiffs had not shown any contractual duty owed them by defendant, the trial court was correct in applying the three-year fraud statute of limitations. Barnett v. Aetna Life Ins. Co., 99 Idaho 246, 580 P.2d 849 (1978).

An action for fraud or a deceit against a professional is covered by the statute of limitations for fraud, subdivision 4. of this section, rather than the statute of limitations for professional malpractice, subdivision 4. of § 5-219. Umphrey v. Sprinkel, 106 Idaho 700, 682 P.2d 1247 (1983).

The plaintiff's allegations based on fraud were not covered by the professional malpractice statute, but rather by the fraud statute of limitations contained in subsection (4) of this section. McCoy v. Lyons, 120 Idaho 765, 820 P.2d 360 (1991).

—Actual Knowledge.

"Discovery", as used in subdivision 4. of this section, means the point in time when the plaintiff had actual or constructive knowledge of the facts constituting the fraud and that the application of subdivision 4. of this section does not depend on when the plaintiff should have been aware that something was wrong. Jones v. Kootenai County Title Ins. Co., 125 Idaho 607, 873 P.2d 861 (1994).

——Inferred.

While "actual knowledge of the fraud" can be inferred if the aggrieved party could have discovered the fraud by reasonable diligence, the courts of this state should hesitate to infer knowledge of fraud. McCoy v. Lyons, 120 Idaho 765, 820 P.2d 360 (1991).

—Commencement of Running of Statute.

This statute begins to run against a water user three years after he discovers that he has been defrauded. Oregon Mtg. Co. v. Renner, 17 F. Supp. 727 (D. Idaho 1937), aff'd, 96 F.2d 429 (9th Cir. 1938).

Time begins to run against a trust as soon as it is openly disavowed by the trustee and the disavowal is clearly made known to the cestui que trust. Olympia Mining & Milling Co. v. Kerns, 24 Idaho 481, 135 P. 255 (1913), appeal dismissed, 236 U.S. 211, 35 S. Ct. 415, 59 L. Ed. 542 (1915).

Knowledge of such facts as would put a reasonably prudent person upon inquiry is equivalent to knowledge of fraud and will start commencement of statute. Williams v. Shrope, 30 Idaho 746, 168 P. 162 (1917); Parish v. Page, 50 Idaho 87, 293 P. 979 (1930).

Statutory period commences to run when the fraud is discovered. Steinour v. Oakley State Bank, 49 Idaho 293, 287 P. 949 (1930).

Where highway district ratified purchase of bonds with sinking funds but failed to publish a required statement, the adoption of the motion to ratify the purchase did not set this statute running against taxpayer's suit to recover funds so invested. Filer Hwy. Dist. ex rel. Alworth v. Shearer, 54 Idaho 201, 30 P.2d 199 (1934).

In action to enforce a trust having its inception in fraud, the cause of action is not deemed to have accrued until the discovery of the fraud. Brasch v. Brasch, 55 Idaho 777, 47 P.2d 676 (1935).

Cause of action founded on mistake in apportionment of school funds does not accrue until discovery of facts constituting the mistake. Independent Sch. Dist. No. 1 v. Common Sch. Dist. No. 1, 56 Idaho 426, 55 P.2d 144 (1936).

Breach of trust by trustee gives rise to cause of action accruing on discovery of the repudiation of the trust. Cruzen v. Boise City, 58 Idaho 406, 74 P.2d 1037 (1937).

Statute does not begin to run in favor of trustee until repudiation of trust and the trust must be repudiated and the period is four years from date of notice to trustor. Cruzen v. Boise City, 58 Idaho 406, 74 P.2d 1037 (1937).

Complaint brought by purchasers against vendors for rescission or damages based on the fact that one cabin and certain sewer pipes and part of a service station encroached upon the right-of-way of the city was not barred by the provisions of § 5-216 and this section where such knowledge of encroachment was had on December 29, 1952, and action was filed January 18, 1954. Galvin v. Appleby, 78 Idaho 457, 305 P.2d 309 (1956).

The limitation under subdivision 4 of this section did not run against an action by the payee of a note against a loan broker for making a usurious loan and thereby subjecting the payee to the statutory penalties for usury, where the payee did not know of the usurious character of the note until the makers defaulted thereon. Bjornstad v. Perry, 92 Idaho 402, 443 P.2d 999 (1968).

Since the alleged promise of seller that certain property adjoining that of purchasers would be reserved for common use was not a lien or encumbrance, order of bankruptcy court authorizing sale of part of such property "free and clear of all liens and encumbrances" did not put the purchasers on notice of fraud and did not start the statute of limitations running on purchasers' action to enforce the promise. Middlekauff v. Lake Cascade, Inc., 103 Idaho 832, 654 P.2d 1385 (1982).

An action seeking relief from mistake will be time-barred under subdivision 4 of this section unless it is filed within three years after the mistake could have been discovered in the exercise of due diligence. Aitken v. Gill, 108 Idaho 900, 702 P.2d 1360 (Ct. App. 1985).

A cause of action accrues at the time the fraud would have been discovered in the exercise of reasonable diligence. Ordinarily, what constitutes reasonable diligence to discover fraud so as to affect the time when the statute of limitations begins to run is a question of fact for the jury; however, where only one conclusion can be reasonably drawn from the evidence, the question of the exercise of reasonable diligence to discover fraud may be decided by the court as a matter of law. Full Circle, Inc. v. Schelling, 108 Idaho 634, 701 P.2d 254 (Ct. App. 1985).

A cause of action against a notary public for falsely acknowledging forged signatures on a promissory note and mortgage did not accrue until sellers of land first learned that they had been damaged by forgery, not when the signatures had been forged and notarized. Osborn v. Ahrens, 116 Idaho 14, 773 P.2d 282 (1989).

The district court erred in calculating the limitation period as commencing from the date of the malpractice or fraud rather than allowing a jury to determine when the plaintiff-heirs discovered the fraud or the facts constituting the fraud as required in subsection 4. of this section; accordingly, the plaintiff-heirs' causes of action sounding in fraud were remanded to the district court for trial. McCoy v. Lyons, 120 Idaho 765, 820 P.2d 360 (1991).

An inmate's claims against a court reporter for fraud and negligence and tortious interference with rights of citizenship were time barred by this section and §§ 5-219 and 5-224 where the claims were filed more than four years after time inmate's attorney, through due diligence, could have discovered alleged omissions in trial transcript. Mason v. Tucker & Assocs., 125 Idaho 429, 871 P.2d 846 (Ct. App. 1994).

—Extent of Concealment.

In cases where fraud, concealment and ignorance of fact are relied upon to suspend running of statute, there must have been such concealment as would prevent person exercising due diligence from discovering facts. Stout v. Cunningham, 33 Idaho 464, 196 P. 208 (1921); Davis v. Consolidated Wagon & Mach. Co., 43 Idaho 730, 254 P. 523 (1927).

The fact of discovery becomes controlling only when the action is based on the ground of fraud or mistake and does not have any application to a new tortious taking which does not involve fraud in its commonly accepted significance. Common School Dist. No. 18 v. Twin Falls State Bank & Trust Co., 52 Idaho 200, 12 P.2d 774 (1932).

—Ignorance or Silence.

Where there is no fraud shown, neither the ignorance of the person of the right to bring action, nor the mere silence of the person liable to the action, will prevent the running of the statute of limitations. Coe v. Sloan, 16 Idaho 49, 100 P. 354 (1909).

Execution of receipts in full by heirs in 1936 at time of final report, and receipt of final payment in 1939, did not bar action by heirs in December of 1942 to recover amount due under and to impress a trust on estate of executor, either on the ground of laches, or by limitations, where heirs were nonresidents, had not read the will, and depended on their uncle as executor to faithfully account for amount due under the will. Burns v. Skogstad, 69 Idaho 227, 206 P.2d 765 (1949).

Where discovery of a cause of action commences the statute of limitations, the date of discovery is a fact question for the jury unless there is no evidence creating a question of fact. McCoy v. Lyons, 120 Idaho 765, 820 P.2d 360 (1991).

—Interruption of Statute.

Statute is not tolled during pendency of litigation between the parties seeking to have the same matter adjudicated on the basis of an action to quiet title. Steinour v. Oakley State Bank, 49 Idaho 293, 287 P. 949 (1930).

The defense that wife's right to attack a quitclaim deed of July 13, 1949, on ground of duress, fraud or undue influence was barred by the three-year statute of limitations was not applicable since it was tolled by the death of her husband within the three year period. Lundy v. Lundy, 79 Idaho 185, 312 P.2d 1028 (1957).

—Pleading and Practice.

Where a cause of action is stated and the answer pleads the bar of the statute of limi-

tations, it is error to enter judgment in favor of defendant on the pleadings, even though it should appear to be barred as shown in the face of the complaint. Chemung Mining Co. v. Hanley, 9 Idaho 786, 77 P. 226 (1904).

General allegation of ignorance of fraud at one time and knowledge at another is of no effect and if plaintiff made any particular discovery it should be stated when it was made, what it was, how it was made, and why it was not made sooner. Stout v. Cunningham, 33 Idaho 464, 196 P. 208 (1921); Ryan v. Old Veteran Mining Co., 37 Idaho 625, 218 P. 381 (1923).

Where proceeds of the sale of property were deposited in court pursuant to a stipulation entered into by the parties under the terms of which the proceeds where to be turned over to the one ultimately entitled thereto, the claim of the assignee of one of the defendants to the portion of the proceeds attached by the plaintiff as property of such defendant, although presented by a proceeding in intervention, more than four years after the attachment but prior to trial of the case, was not barred by limitation since it was filed before the trial and was therefore timely. Anderson v. Ferguson, 56 Idaho 554, 57 P.2d 325 (1936).

Cross-complaint was filed more than three years after discovery, by cross-complainants, of the facts constituting the alleged mistake on which the cross-complaint was based, and the cause of action therein stated is barred. Commercial Cas. Ins. Co. v. Boise City Nat'l Bank, 61 Idaho 124, 98 P.2d 637 (1940).

In an action for damages resulting from conspiracy founded on fraud, general allegations that the facts constituting the fraud were not discovered until the time within the period of limitations preceding commencement of the action, without alleging such facts of concealment as would prevent a person exercising due diligence from discovering the fraud, how the fraud was discovered, and why it was not discovered sooner, were insufficient to suspend the running of the statute of limitations. Aker v. Sears, Roebuck & Co., 38 F. Supp. 741 (D. Idaho 1941).

Where plaintiff alleged wrongful sale of his cattle and appropriation of proceeds by defendant, the action sounded in tort and not in contract, and defendant's defense of statute of limitations was not rendered inapplicable by plaintiff's contention that the tort action had been waived and the action based on implied contract. Davidson v. Davidson, 68 Idaho 58, 188 P.2d 329 (1947).

Where intervenor brought action against warehouseman for conversion of grain more than three years after making demand on warehouseman for the grain, three year statute of limitations of this section was not tolled by intervenor's petitioning the commissioner of agriculture under § 69-209 as commissioner did not commence a suit in intervenor's behalf and intervenor's petition to commissioner did not constitute commencing an action. United States v. Fireman's Fund Ins. Co., 191 F. Supp. 317 (D. Idaho 1961).

The fact that one of the grounds for dismissal of appellant's fraud claim was based upon the statute of limitations of this section and might have been in error was of no consequence and could be disregarded if the judgment could be sustained upon one of the other alternative grounds. MacLeod v. Reed, 126 Idaho 669, 889 P.2d 103 (Ct. App. 1995).

—Time Limitations.

As to a fraud claim asserted in a case alleging sexual molestation of children, two daughters failed to plead with the particularity required in that they did not plead any false representations by the father. In any event, the claim would have been time barred. Glaze v. Deffenbaugh, 144 Idaho 829, 172 P.3d 1104 (2007).

Cited in: Gwinn v. Melvin, 9 Idaho 202, 72 P. 961 (1903); Chemung Mining Co. v. Hanley, 9 Idaho 786, 77 P. 226 (1903); Bates v. Capital State Bank, 18 Idaho 429, 110 P. 277 (1910); Canady v. Coeur d'Alene Lumber Co., 21 Idaho 77, 120 P. 830 (1911); Hillock v. Idaho Title & Trust Co., 24 Idaho 242, 133 P. 119 (1913); Collman v. Wanamaker, 27 Idaho 342, 149 P. 292 (1915); Steinour v. Oakley State Bank, 32 Idaho 91, 177 P. 843 (1918); Rogers v. Rogers, 42 Idaho 158, 243 P. 655 (1926); MacLeod v. Stelle, 43 Idaho 64, 249 P. 254 (1926); Craig v. Partridge, 48 Idaho 471, 282 P. 940 (1929); Lavin v. Panhandle Lumber Co., 51 Idaho 1, 1 P.2d 186 (1931); Fishback v. Jensen, 52 Idaho 61, 11 P.2d 361 (1932); State Ins. Fund v. Hunt, 52 Idaho 639, 17 P.2d 354 (1933); Doolittle v. Eckert, 53 Idaho 384, 24 P.2d 36 (1933); Eldridge v. Idaho State Penitentiary, 54 Idaho 213, 30 P.2d 781 (1934); Independent Sch. Dist. No. 1 v. Common Sch. Dist. No. 1, 56 Idaho 426, 55 P.2d 144 (1936); Cruzen v. Boise City, 58 Idaho 406, 74 P.2d 1037 (1937); Commercial Cas. Ins. Co. v. Boise City Nat'l Bank, 61 Idaho 124, 98 P.2d 637 (1940); Snyder v. Blake, 69 Idaho 14, 202 P.2d 394 (1949); State ex rel. Cromwell v. Panzeri, 76 Idaho 211, 280 P.2d 1064 (1955); White v. Conference Claimants Endowment Comm'n, 81 Idaho 17, 336 P.2d 674 (1959); Billings v. Sisters of Mercy, 86 Idaho 485, 389 P.2d 224 (1964); Sharp v. Idaho Inv. Corp., 95 Idaho 113, 504 P.2d 386 (1972); Duff v. Draper, 96 Idaho 299, 527 P.2d 1257 (1974); Salmon Rivers Sportsman Camps, Inc. v. Cessna Aircraft Co., 97 Idaho 348, 544 P.2d 306 (1975); Dumas v. Ropp, 98 Idaho 61, 558 P.2d 632 (1977); Pavlak v. Church, 727 F.2d 1425 (9th Cir. 1984); Hecla Mining Co. v. Idaho State Tax Comm'n, 108 Idaho 147, 697 P.2d 1161 (1985); Hibbler v. Fisher, 109 Idaho 1007, 712

P.2d 708 (Ct. App. 1985); Henderson v. State, 110 Idaho 308, 715 P.2d 978 (1986); Middlekauff v. Lake Cascade, Inc., 110 Idaho 909, 719 P.2d 1169 (1986); Mack Fin. Corp. v. Smith, 111 Idaho 8, 720 P.2d 191 (1986); Witt v. Jones, 111 Idaho 165, 722 P.2d 474 (1986); Herrera v. Conner, 111 Idaho 1012, 729 P.2d 1075 (Ct. App. 1986); Anderson v. Anderson, Kaufman, Ringert & Clark, Chartered, 116 Idaho 359, 775 P.2d 1201 (1989); Kugler v. Drown, 119 Idaho 687, 809 P.2d 1166 (Ct. App. 1991); State ex rel. Johnson v. Niederer, 123 Idaho 282, 846 P.2d 933 (Ct. App. 1992); Magic Valley Radiation v. Kolouch, 123 Idaho 434, 849 P.2d 107 (1993); Farmers Nat'l Bank v. Shirey, 126 Idaho 63, 878 P.2d 762 (1994); State Dep't of Emp. v. Blachly, 126 Idaho 121, 879 P.2d 29 (1994); Henderson v. Smith, 128 Idaho 444, 915 P.2d 6 (1996); Kimbrough v. Reed, 130 Idaho 512, 943 P.2d 1232 (1997); DBSI/TRI V v. Bender, 130 Idaho 796, 948 P.2d 151 (1997); Lohman v. Flynn, 139 Idaho 312, 78 P.3d 379 (2003).

RESEARCH REFERENCES

Am. Jur. — 37 Am. Jur. 2d, Fraud and Deceit, §§ 338 to 351.

51 Am. Jur. 2d, Limitation of Actions, §§ 127, 131 to 132.

C.J.S. — 37 C.J.S., Fraud, § 1 et seq.

54 C.J.S., Limitations of Actions, § 96 et seq.

A.L.R. — Statutes of limitation concerning actions of trespass as applicable to actions for injury to property not constituting a common law trespass. 15 A.L.R.3d 1228.

Statute of limitations in illegitimacy or bastardy proceedings. 59 A.L.R.3d 685.

5-219. Actions against officers, for penalties, on bonds, and for professional malpractice or for personal injuries. — Within two (2) years:

1. An action against a sheriff, coroner or constable, upon the liability incurred by the doing of an act in his official capacity, and in virtue of his office, or by the omission of an official duty, including the nonpayment of money collected upon an execution.

2. An action upon a statute for a penalty or forfeiture, where the action is given to an individual, or to an individual and the state, except when the statute imposing it prescribes a different limitation.

3. An action upon a statute or upon an undertaking in a criminal action for a forfeiture or penalty to a county or to the people of the state.

4. An action to recover damages for professional malpractice, or for an injury to the person, or for the death of one caused by the wrongful act or neglect of another, including any such action arising from breach of an implied warranty or implied covenant; provided, however, when the action is for damages arising out of the placement and inadvertent, accidental or unintentional leaving of any foreign object in the body of any person by reason of the professional malpractice of any hospital, physician or other person or institution practicing any of the healing arts or when the fact of damage has, for the purpose of escaping responsibility therefor, been fraudulently and knowingly concealed from the injured party by an alleged wrongdoer standing at the time of the wrongful act, neglect or breach in a professional or commercial relationship with the injured party, the same shall be deemed to accrue when the injured party knows or in the exercise of reasonable care should have been put on inquiry regarding the condition or matter complained of; but in all other actions, whether arising from professional malpractice or otherwise, the cause of action shall be deemed to have accrued as of the time of the occurrence, act or omission complained of, and the limitation period shall not be extended by reason of any continuing

consequences or damages resulting therefrom or any continuing professional or commercial relationship between the injured party and the alleged wrongdoer, and, provided further, that an action within the foregoing foreign object or fraudulent concealment exceptions must be commenced within one (1) year following the date of accrual as aforesaid or two (2) years following the occurrence, act or omission complained of, whichever is later. The term "professional malpractice" as used herein refers to wrongful acts or omissions in the performance of professional services by any person, firm, association, entity or corporation licensed to perform such services under the law of the state of Idaho. This subsection shall not affect the application of section 5-243, Idaho Code, except as to actions arising from professional malpractice. Neither shall this subsection be deemed or construed to amend, or repeal section 5-241, Idaho Code.

5. An action for libel, slander, assault, battery, false imprisonment or seduction.

6. An action against a sheriff or other officer for the escape of a prisoner arrested or imprisoned on civil process.

History.
C.C.P. 1881, § 159; R.S., § 4055; am. 1903, p. 56, § 1; reen. R.C. & C.L., § 4055; C.S., § 6612; I.C.A., § 5-219; am. 1971, ch. 180, § 1, p. 845.

STATUTORY NOTES

Effective Dates.
Section 2 of S.L. 1971, ch. 180 declared an emergency. Approved March 24, 1971.

JUDICIAL DECISIONS

Analysis

Personal injury actions.
—Negligent design and construction.
—Section 1983 actions.
Professional service.
Tolling of statute.
Violation of Idaho Communications Security Act.
Wiretapping.
Worker's compensation claims.
Wrongful death actions.

Abuse of Process.

A cause of action for abuse of process accrues from the termination of the acts which constitute the abuse complained of. Gowin v. Altmiller, 455 F. Supp. 743 (D. Idaho 1978), aff'd, 647 F.2d 170 (9th Cir. 1981). But see Idaho State Bar v. Tway, 128 Idaho 794, 919 P.2d 323 (1996).

The four-year statute of limitations contained in § 5-224, instead of the two-year statute of limitations under this section, applies to abuse of process claims. Gowin v. Altmiller, 663 F.2d 820 (9th Cir. 1981). But see Idaho State Bar v. Tway, 128 Idaho 794, 919 P.2d 323 (1996).

Accrual of Action.

The cause of action for an accountant's malpractice for each fiscal year first accrued at the time of the actual occurrence of the illegal acts of malpractice, rather than the date when the auditors first discovered the defalcations. Owyhee County v. Rife, 100 Idaho 91, 593 P.2d 995 (1979).

Under this section, a cause of action accrues at the time of the wrongdoing, rather than at the time of discovery of the wrongful act. Wing v. Martin, 107 Idaho 267, 688 P.2d 1172 (1984).

Since, under the cause of action for wrongful birth, there is no defective child until and unless the birth occurs, the statute of limitations cannot begin to run until the date of birth. Blake v. Cruz, 108 Idaho 253, 698 P.2d 315 (1984).

There is no broad discovery exception under this section; instead, the limitation period begins to run from the date damage has occurred. Zumwalt v. Stephan, Balleisen & Slavin, 113 Idaho 822, 748 P.2d 406 (Ct. App. 1987).

A cause of action against a notary public for falsely acknowledging forged signatures on a promissory note and mortgage did not accrue until sellers of land first learned that they had been damaged by forgery, not when the signatures had been forged and notarized. Osborn v. Ahrens, 116 Idaho 14, 773 P.2d 282 (1989).

Despite the language in subdivision 4 of this section that a cause of action shall be deemed to have accrued as of the time of the occurrence, act or omission complained of, a cause of action does not accrue at the time of the act complained of unless some damage has occurred. Hawley v. Green, 117 Idaho 498, 788 P.2d 1321 (1990).

Debtor's suit for libel, against bank issuing credit card, based on the erroneous reporting of credit information was barred by the statute of limitations because the cause of action accrued at the time the bank first furnished the information to the credit reporting agency, not at the time of the discovery of the wrongful act four years later. Hoglan v. First Sec. Bank, 120 Idaho 682, 819 P.2d 100 (1991).

Where a patient eventually lost her sight after cataract surgery in October 1999, the only issue of negligence presented concerned the doctor's post-operative care. The patient's claim could not have accrued before the first incident of alleged malpractice, which was on November 12, 1999; the patient filed her request for a prelitigation screening panel on November 8, 2001, less than two years after the alleged act of malpractice, so her claim was not barred by the statute of limitations. Conway v. Sonntag, 141 Idaho 144, 106 P.3d 470 (2005).

Trial court erred in dismissing plaintiff's federal civil rights action against the state for false imprisonment. It failed to afford plaintiff credit for the time that plaintiff served before a sentence was imposed, and the two-year statute of limitations did not begin to run until the false imprisonment ended; hence, plaintiff's claim was timely. McCabe v. Craven, 145 Idaho 954, 188 P.3d 896 (2008).

Action Against Architect.

Where the owners of a poorly constructed clinic sued its architect eight years after the completion of the building, § 5-241 and this section barred all claims against the architect except those which rested upon fraudulent misrepresentations made by the architect. Twin Falls Clinic & Hosp. Bldg. Corp. v. Hamill, 103 Idaho 19, 644 P.2d 341 (1982).

Where the architect of a construction project had made representations regarding the separation and cracking of mortar intended to be relied upon by him and which were relied upon by the owners of the construction project, an issue of material fact remained as to whether the architect was estopped from asserting the statute of limitations, and hence summary judgment was precluded. Twin Falls Clinic & Hosp. Bldg. Corp.

v. Hamill, 103 Idaho 19, 644 P.2d 341 (1982).

Statement in *Twin Falls Clinic v. Hamill*, 103 Idaho 19, 644 P.2d 341 (1982) that § 5-241 engrafted a limited discovery exception in the area of tort liability arising out of the design or construction of improvements to real property, and that such exemption would only be applicable to latent defects since patent defects by definition would be those which should have been discovered, was not intended to be a broad statement expressing the general application of § 5-241 but rather, was an expression of how § 5-241 functions in the narrow setting of an action alleging defective design; where plaintiff had not sought to prove that defendant architect's design was defective, but alleged that he was negligent in his inspection of the apartment, such statement of law did not apply. Stephens v. Stearns, 106 Idaho 249, 678 P.2d 41 (1984).

Cause of action against architect alleging negligent inspection of apartment complex fell within § 5-241, rather than this section, because plaintiff's tort cause of action was one which arose out of the construction of an improvement to real property. Stephens v. Stearns, 106 Idaho 249, 678 P.2d 41 (1984).

Action Against County.

The statute of limitations runs against the county in a civil action brought by the county against an ex-clerk of the district court, who was ex-officio auditor and recorder of such county, for alleged illegal fees and compensation collected by him from the county during the term of his office. Bannock County v. Bell, 8 Idaho 1, 65 P. 710 (1901).

Action Against Court Reporter.

An inmate's claims against a court reporter for fraud and negligence and tortious interference with rights of citizenship were time barred by this section and §§ 5-218 and 5-224 where the claims were filed more than four years after time inmate's attorney, through due diligence, could have discovered alleged omissions in trial transcript. Mason v. Tucker & Assocs., 125 Idaho 429, 871 P.2d 846 (Ct. App. 1994).

Action Against Dentist.

Where the defendant dentist was sued for his alleged negligent actions in cutting the nerves in the plaintiff's mouth while extracting a wisdom tooth, the trial court properly held that the statute of limitations began to run on the plaintiff's cause of action on the date of the extraction; furthermore, since the plaintiff's allegation that defendant failed to warn plaintiff of the risks inherent in the procedure would of necessity have had to have occurred prior to the date of extraction, the statute of limitations would also have run on that claim. Masi v. Seale, 106 Idaho 561, 682 P.2d 102 (1984).

Action Against Sheriff.

While the statute does not apply to bankruptcy proceedings, if judgment creditor could no longer recover against sheriff for damages to attached property, bankrupt's claim against judgment creditor therefor should be barred by laches. Pindel v. Holgate, 221 F. 342 (9th Cir. 1915).

Cause of action against sheriff for not paying over proceeds of attached property does not accrue until there has been final judgment in attachment suit establishing right to funds. Sullivan v. Mabey, 45 Idaho 595, 264 P. 233 (1928).

Action against sheriff and his sureties accrues on date of demand on sheriff for return of property wrongfully attached. Oaks v. American Sur. Co., 58 Idaho 482, 76 P.2d 932 (1938).

Either subdivision 1 or subdivision 5 of this section could have been applied as the most analogous state statute of limitations in a civil rights action under 42 U.S.C. § 1983 against a sheriff and his deputy. Gowin v. Altmiller, 455 F. Supp. 743 (D. Idaho 1978), aff'd, 647 F.2d 170 (9th Cir. 1981). But see Idaho State Bar v. Tway, 128 Idaho 794, 919 P.2d 323 (1996).

Asbestos-Related Injury.

The action for personal injuries to and wrongful death of decedents who died of asbestosis resulting from exposure to asbestos was remanded to the district court for determination of the statute of limitations issue in light of *Davis v. Moran*, 112 Idaho 703, 735 P.2d 1014 (1987), where the supreme court interpreted subdivision 4 of this section in such a manner that the limitations period does not commence on the date of the tortfeasor's conduct under certain circumstances. Adams v. Armstrong World Indus., Inc., 847 F.2d 589 (9th Cir. 1988).

Plaintiff's complaint was barred by the two-year statute of limitation on personal injuries found in this section where there was objective medical proof supporting the existence of plaintiff's asbestos-related injury in a July 1992 report, and plaintiff did not file the claim until October 1994. Brennan v. Owens-Corning Fiberglas Corp., 134 Idaho 800, 10 P.3d 749 (2000).

Attorney's Fees.

Action on policy of life insurance in which temporary contract of insurance was found to exist was governed by five year limitation of § 5-216 and, therefore, attorney's fees being part of the relief granted in the case the limitation of § 5-216 also applied to such fees and not the two year limitation of subdivision 2 of this section. Dunford v. United of Omaha, 95 Idaho 282, 506 P.2d 1355 (1973).

In a malpractice action by a real estate loan broker against an attorney who helped close

the loan in question, which was based on the attorney's failure to advise the broker as to the attorney's knowledge of the true value of the property, statute of limitations began to run on the date the broker suffered damages by incurring attorney fees in defending against an action brought by lenders. Griggs v. Nash, 116 Idaho 228, 775 P.2d 120 (1989).

Constitutionality.

Subdivision 4 of this section is not constitutionally infirm and does not violate either the due process or equal protection clauses of the United States Constitution. Holmes v. Iwasa, 104 Idaho 179, 657 P.2d 476 (1983).

Subdivision 4 of this section does not violate Idaho Const., art. 1, § 18, despite the fact that it eliminates certain classes of plaintiffs. Adams v. Armstrong World Indus., Inc., 664 F. Supp. 463 (D. Idaho 1987), rev'd on other grounds, 847 F.2d 589 (9th Cir. 1988).

Subsection 4 of this section does not violate Idaho Const., art. 1, § 18 as that section merely admonishes the courts to dispense justice and to secure citizens the rights and remedies afforded by the legislature or by the common law; it does not create any substantive rights. Hawley v. Green, 117 Idaho 498, 788 P.2d 1321 (1990).

Continuous Tort.

Where a real estate agent alleged outrageous conduct by real estate developers in 2003, which ceased and did not resume until 2005, the two-year statute of limitations for the 2003 conduct expired in 2005, and the resumption of outrageous conduct in 2005 did not revive the real estate agent's 2003 claim under a continuous tort theory. Johnson v. McPhee, 147 Idaho 455, 210 P.3d 563 (Ct. App. 2009).

Doctrine of Equitable Estoppel.

The language of this section does not demonstrate or imply that the doctrine of equitable estoppel be repealed or abolished. Williams v. Blakley, 114 Idaho 323, 757 P.2d 186 (1987).

City failed to produce evidence supporting its equitable estoppel claim where the city did not show that its attorneys had made a false representation or concealed a material fact with actual or constructive knowledge of the truth when they advised the city before and during the litigation filed against the city. City of McCall v. Buxton, 146 Idaho 656, 201 P.3d 629 (2009).

Effect of Federal Injunction.

Where prosecution of action was barred by federal injunction in reorganization proceedings, another action brought in conformity with federal proceedings was not barred. Doxstater v. Northwest Cities Gas Co., 65 Idaho 814, 154 P.2d 498 (1944).

Failure to Raise Issue.

Where the plaintiff did not allege fraudulent or intentional concealment in his malpractice complaint, nor did he raise the issue of equitable estoppel in his objection to the defendant's motions for summary judgment or during oral argument, the court would not consider these issues. Rice v. Litster, 132 Idaho 897, 980 P.2d 561 (1999).

Fraudulent Concealment.

Summary judgment was properly granted to a father in a tort case based on alleged sexual molestation of two daughters since the action was time barred. The fraudulent concealment exception in this section applies to professional malpractice claims only. Glaze v. Deffenbaugh, 144 Idaho 829, 172 P.3d 1104 (2007).

HIV Infection.

For plaintiff who was a hemophiliac who claimed to have been infected with HIV by provider of blood-clotting agent, the two-year statute of limitations did not begin to run until the date that plaintiff tested positive for HIV. Doe v. Cutter Biological, 844 F. Supp. 602 (D. Idaho 1994).

Knowledge of Cause of Action.

Where plaintiff's suit for a malpractice occurring in 1948 was based upon the discovery of a sponge in plaintiff's body revealed by exploratory operation in 1961, cause of action was not barred by the statute of limitations even though the suit was not brought until 1962. Billings v. Sisters of Mercy, 86 Idaho 485, 389 P.2d 224 (1964).

In an action against physician by patient and her husband to recover for malpractice involving alleged misdiagnosis and negligent treatment, the statute of limitations did not begin to run until the plaintiff knew or should have known of the defendant's negligence. Renner v. Edwards, 93 Idaho 836, 475 P.2d 530 (1969).

Where plaintiff set forth all facts necessary to show his knowledge of the alleged injury at the time of filing verified complaint in prior action in 1966, the subsequent action instituted in 1970 along with the alleged cause no later than 1966 was barred by the statute although subsequent complaint included that the alleged malpractice was discovered in 1969. Patterson v. Twin Falls County, 94 Idaho 460, 490 P.2d 327 (1971).

Summary judgment based on statute of limitations was upheld because plaintiff failed to establish a triable issue of material fact respecting fraudulent concealment of bullet in the body, where plaintiff's sole affidavit contained no reference to the time when the bullet was discovered but a general statement that it was discovered within two years, no time as to feeling of pain was specified, sur-

geon who found bullet was not identified and no discussion of particulars as to alleged misleading by surgeon was given. Johnson v. Gorton, 94 Idaho 595, 495 P.2d 1 (1972).

Fraudulent concealment does toll the statute of limitations in a malpractice action until plaintiff discovers or should have discovered injury resulting from negligent treatment. Johnson v. Gorton, 94 Idaho 595, 495 P.2d 1 (1972).

Where a secured creditor filed a professional malpractice action against the debtor's accountants within two years after it became aware that it would not be able to recover the full amount of the debtor's indebtedness to it from the bankruptcy trustee, the action was not time barred; the action did not accrue until the bankruptcy court resolved the creditor's claim against the debtor because it was not until then that the creditor suffered some damage, as it became apparent that the creditor would not be able to fully recompense from the bankruptcy estate the amount which it had loaned to the debtor. Mack Fin. Corp. v. Smith, 111 Idaho 8, 720 P.2d 191 (1986).

Damage to the homeowners' house was objectively ascertainable during the spring or summer of 1997, when the homeowners and an architect determined the western side of the house was observably sinking, but no complaint was filed until September 3, 1999; because there was objectively ascertainable damage more than two years before the filing date, the homeowners' negligence claim against the engineering firm was beyond the statute of limitations. Blahd v. Richard B. Smith, Inc., 141 Idaho 296, 108 P.3d 996 (2005).

Malpractice Actions.

Action for malpractice is not based on contract but on negligence and is governed by this section. Trimming v. Howard, 52 Idaho 412, 16 P.2d 661 (1932).

Where, in malpractice action, the accident occurred on May 28, 1931, and plaintiff first consulted defendant on that day for treatment, complaint filed on December 5, 1933 was not barred, in view of evidence that on January 28, 1932 defendant advised plaintiff to throw away his crutches and put weight on his leg and that plaintiff was damaged by following this advice. Moore v. Tremelling, 100 F.2d 39 (9th Cir. 1938).

Running of statute of limitation applicable to malpractice cases is not postponed until the injury has been or shall have been discovered, but begins to run when actual post-operative treatment by defendant doctor has terminated. Summers v. Wallace Hosp., 276 F.2d 831 (9th Cir. 1960).

Based on this section and § 5-201, civil action to recover damages for injury to the person, caused by the wrongful act or negligence of another can only be commenced within two years after the cause of action shall have accrued. Billings v. Sisters of Mercy, 86 Idaho 485, 389 P.2d 224 (1964).

The gist of a malpractice action is negligence and not a breach of the contract of employment. Billings v. Sisters of Mercy, 86 Idaho 485, 389 P.2d 224 (1964).

Where a foreign object is negligently left in a patient's body by his physician and the patient is in ignorance of the fact and consequently of his right of action for malpractice, the cause of action does not accrue until the patient learns of, or in the exercise of reasonable care and diligence should have learned of, the presence of such foreign object in his body. Billings v. Sisters of Mercy, 86 Idaho 485, 389 P.2d 224 (1964).

The limitation of subdivision 4 of this section with respect to an action for medical malpractice based upon a faulty diagnosis begins to run at the time of the alleged malpractice and not when plaintiff knew, or by the exercise of reasonable diligence should have known, of such malpractice and the resulting injury to her. Owens v. White, 380 F.2d 310 (9th Cir. 1967) (Distinguishing *Billings v. Sisters of Mercy*, 86 Idaho 485, 389 P.2d 224 (1964), which applies only to foreign object cases).

The court, in an action against physician by patient and her husband to recover for malpractice involving alleged misdiagnosis and negligent treatment, did not improperly indulge in judicial legislation in defining time of accrual of cause of action as being the time of discovery of the negligent act. Renner v. Edwards, 93 Idaho 836, 475 P.2d 530 (1969).

In malpractice action filed September 28, 1972 for alleged malpractice that occurred June 22, 1962, in order to overcome statute of limitations bar raised by defendant's motion for summary judgment plaintiff was required to present sufficient materials to bring him within the discovery exception to the statute of limitations. Cook v. Soltman, 96 Idaho 187, 525 P.2d 969 (1974).

In malpractice action filed September 28, 1972 for alleged malpractice that occurred June 22, 1962 where plaintiff knew that shirt and tree were imbedded in his back and knew that the wound had not healed properly since it continuously caused him pain, such knowledge required him to be prompt and diligent in avoiding further deterioration of his condition, and as he failed to do so his action did not come within the discovery exception and was barred by the statute of limitations. Cook v. Soltman, 96 Idaho 187, 525 P.2d 969 (1974).

Where surgery was performed on plaintiff on March 9, 1971, but where the surgical needle which was left in plaintiff's abdomen was not discovered until July 31, 1973, the one year statute of limitations provided for in

subdivision 4 of this section barred plaintiff's cause of action for malpractice brought on December 24, 1974. Stoner v. Carr, 97 Idaho 641, 550 P.2d 259 (1976).

Clear legislative intent of subdivision 4 is not to create an additional "discovery" exception for legal malpractice actions. Martin v. Clements, 98 Idaho 906, 575 P.2d 885 (1978).

Legal malpractice cause of action brought by decedent's heirs in regard to probate of father's estate in 1954 accrued in 1954 at the time of the alleged negligence, rather than in 1972 when plaintiffs discovered the alleged negligence; thus, this section, as amended, imposing two-year limitation on professional malpractice actions could not be applied because to do so would be to give retroactive effect to the statute. Martin v. Clements, 98 Idaho 906, 575 P.2d 885 (1978).

There is no intent, either explicit or implicit, in the language of this section to eliminate the doctrine of equitable estoppel in professional malpractice actions. Twin Falls Clinic & Hosp. Bldg. Corp. v. Hamill, 103 Idaho 19, 644 P.2d 341 (1982).

Although the language of this section indicates that the statute of limitations is not to be extended by a continuing relationship, this section does not indicate any clear intent to abolish the doctrine of estoppel; estoppel does not depend solely upon the existence of a continuing relationship and estoppel does not "extend" a statute of limitations, but rather prevents a party from pleading and utilizing the statute of limitations as a bar, although the time limit of the statute of limitations may have run. Twin Falls Clinic & Hosp. Bldg. Corp. v. Hamill, 103 Idaho 19, 644 P.2d 341 (1982).

A discovery exception to the statute of limitations for professional malpractice, under subdivision 4 of this section, should not be engrafted by the supreme court. Twin Falls Clinic & Hosp. Bldg. Corp. v. Hamill, 103 Idaho 19, 644 P.2d 341 (1982).

An action founded in contract and arising out of the design or construction of improvements to real property must be brought within five years from the date of the completion of the construction, and a cause of action founded in professional malpractice arising out of the design or construction of improvements to real property must be brought within two years of the discovery of the alleged malpractice and in no event later than eight years following the completion of the construction. Twin Falls Clinic & Hosp. Bldg. Corp. v. Hamill, 103 Idaho 19, 644 P.2d 341 (1982).

The statutory language, "condition or matter complained of" in subdivision 4 of this section means the condition which ultimately is alleged to constitute the malpractice or negligence of the doctor. Reis v. Cox, 104 Idaho 434, 660 P.2d 46 (1982).

Where a patient with eyesight problems delayed nearly 23 months after an ophthalmologist discovered his glaucoma in January of 1976, before filing his malpractice action in December, 1977 against an optometrist who had examined him in November of 1975 and had incorrectly determined that he did not have glaucoma, the patient's claim for professional malpractice was barred by subdivision 4 of this section, even though the optometrist had ordered bifocals for the patient in December of 1975 and fitted them to the patient's head in January of 1976, because subdivision 4 expressly states that any continuing professional relationship does not extend the limitations period. Holmes v. Iwasa, 104 Idaho 179, 657 P.2d 476 (1983).

Where the record revealed no evidence that the defendant's optometrist made any statements or took any action in an effort to induce plaintiff's patient to delay in bringing suit, the optometrist was not estopped from asserting the statute of limitations as a defense. Holmes v. Iwasa, 104 Idaho 179, 657 P.2d 476 (1983).

A cause of action presented in malpractice is not a contract action; the gist of a malpractice action is negligence, not a breach of contract of employment. Ogle v. De Sano, 107 Idaho 872, 693 P.2d 1074 (Ct. App. 1984).

Subdivision 4 of this section is an integral part of the Idaho Products Liability Act (see § 6-1401 et seq.) because it defines "accrual" of causes of action under the act; thus, subdivision 4 of this section is substantive, not procedural. Jenkins v. Armstrong World Indus., Inc., 643 F. Supp. 17 (D. Idaho 1985).

A cause of action for professional accounting malpractice in the form of negligent preparation of income tax returns accrued when the internal revenue service disputed the returns and assessed penalties and interest. Streib v. Veigel, 109 Idaho 174, 706 P.2d 63 (1985).

The plaintiff's medical malpractice action was not time barred, where the panel held hearings within 90 days from the date the claim was filed with the state board of medicine, but the panel did not reach a decision within 90 days, there was no evidence that the panel was unable to decide the issues before it or that the panel ever summarily concluded the proceedings, and the plaintiff filed her claim in district court within 30 days of the filing of the panel's decision. James v. Buck, 111 Idaho 708, 727 P.2d 1136 (1986).

The latent circumstance of increased probability of embolization, resulting in possible future adverse medical consequences was far too attenuated an "occurrence" to give rise to a viable cause of action such as would activate a statute of limitations; plaintiff's cause of action arose either at the time of his stroke in

which case the action was timely filed or on date that plaintiff visited defendant complaining of chest pains, if the occurrences of that day were shown to have been damage caused by embolization from heart valve due to defendants' alleged inadequate treatment, in which case action was untimely filed. Werner v. American-Edwards Labs., Inc., 113 Idaho 434, 745 P.2d 1055 (1987).

Subdivision 4 of this section provides two exceptions to the accrual-on-occurrence rule: where foreign objects are left in a patient's body, or when the fact of damage has, for the purpose of escaping responsibility therefor, been fraudulently and knowingly concealed from the injured party by an alleged wrongdoer standing at the time of the wrongful act, neglect, or breach in a professional or commercial relationship with the injured party. Zumwalt v. Stephan, Balleisen & Slavin, 113 Idaho 822, 748 P.2d 406 (Ct. App. 1987).

A third-party action by a real estate loan broker against an attorney who helped close a loan was held to be an action for malpractice rather than one for indemnification or contribution where the complaint alleged a breach of fiduciary duty and negligence on the part of the attorney for failing to clear title to the property involved and failing to advise as to the property's true value; hence, the two-year statute of limitations in this section applied. Griggs v. Nash, 116 Idaho 228, 775 P.2d 120 (1989).

The existence or effect of any alleged negligence regarding the attorneys' strategy and legal advice as to the statute of limitations depended upon the outcome of the litigation against the city by the insurer and contractor; there could not be objective proof of actual damage until the litigation was concluded, and the fact that the city was sued did not, by itself, constitute a breach of duty by the attorneys. City of McCall v. Buxton, 146 Idaho 656, 201 P.3d 629 (2009).

Complaint alleging that the attorneys negligently advised the city to release claims against an engineer and failed to advise the city of a conflict of interest regarding their advice to release the engineer from liability began to run when the city released its claim against the engineer, but the city did not file its malpractice action until four years later; the day the city released the engineer from liability was the date on which the city lost its opportunity to recover against the engineer and the date on which the damage occurred if the attorneys negligently failed to advise the city to release the engineer. City of McCall v. Buxton, 146 Idaho 656, 201 P.3d 629 (2009).

—Accrual.

In a malpractice action for alleged failure of doctor to remove two drainage tubes he put in plaintiff, the statute of limitations did not begin to run until discovery of the drains or until they should have been discovered by use of reasonable care. Johnson v. Stoddard, 96 Idaho 230, 526 P.2d 835 (1974).

An action for professional malpractice shall be deemed to have accrued for the purposes of subsection 4 of this section only when there is objective proof that would support the existence of some actual damage. Chicoine v. Bignall, 122 Idaho 482, 835 P.2d 1293 (1992).

Where the latest possible date that plaintiff's legal malpractice cause of action accrued under subdivision 4 of this section was November 16, 1983, the date the underlying personal injury action was negligently allowed to be dismissed by respondents, and where it was only on that date, following either a far removed antecedent negligent act or the continuing negligence of respondents, that appellant was damaged, the limitation period applicable to legal malpractice action expired November 16, 1985 and barred plaintiff's complaint, which was not filed until March 1987. Tingley v. Harrison, 125 Idaho 86, 867 P.2d 960 (1994).

When professional malpractice involves fraudulent or intentional concealment of the wrongdoing, even when the initial wrongdoing is merely negligent, the statute of limitation contained in subdivision 4 of this section is tolled until the injured party "knows or in the exercise of reasonable care should have been put on inquiry regarding the matter complained of"; after that date, the statute of limitation period is one year, after which an action for professional malpractice is barred. Tingley v. Harrison, 125 Idaho 86, 867 P.2d 960 (1994).

Grant of summary judgment in favor of defendant attorney on a malpractice claim on the grounds that the applicable statute of limitations of subdivision 4 of this section had expired was proper because plaintiff was actually damaged when it accrued legal fees due to its need to hire new counsel to oversee damage control in a matter involving work done by the former attorney and that event, which occurred more than two years prior to the commencement of the malpractice action, started the running of the statute of limitations. B & K Fabricators, Inc. v. Sutton, 126 Idaho 934, 894 P.2d 167 (Ct. App. 1995).

The one-year limitation contained in the concealment exception of subsection 4 of this section begins to run when the injured party knows or in the exercise of reasonable care should have been put on inquiry of the alleged malpractice, not when the injured party knows or was put on inquiry of the fact of damage. Bliss Valley Foods, Inc. v. Walker, 127 Idaho 12, 896 P.2d 338 (1995).

Where a client suffered some actual damage when a trial court entered judgment against him in an underlying action for which

the client claimed attorney malpractice, the two-year limitation period began to run at the time of the judgment, even though the client did not know until the judgment was affirmed on appeal that his counterclaim and defenses would not be revived. Rice v. Litster, 132 Idaho 897, 980 P.2d 561 (1999).

Trial court did not err when it granted summary judgment to an attorney who had been sued for professional negligence where suit was time barred because it had been brought more than two years after the damage was objectively discernable to client. Lapham v. Stewart, 137 Idaho 582, 51 P.3d 396 (2002).

—Continuing Negligence.

By the 1971 amendment to this section, the legislature expressly rejected the theory of continuing negligence advocated by the plaintiff in a legal malpractice action and, thus, plaintiff was barred from recovery under subdivision 4 of this section. Pichon v. Benjamin, 108 Idaho 852, 702 P.2d 890 (Ct. App. 1985).

—Evidence.

The evidence was conflicting as to whether the parties intended the oral settlement reached over the phone to be binding or whether they intended the written release mailed later to be the binding settlement. Therefore, the trial court should not have granted summary judgment on the basis of this section. Thompson v. Pike, 122 Idaho 690, 838 P.2d 293 (1992); Thompson v. Pike, 125 Idaho 897, 876 P.2d 595 (1994).

—Foreign Objects.

The legislative intent to confine the discovery exception of subdivision 4 of this section to cases involving foreign objects and fraudulent concealment is clear. Holmes v. Iwasa, 104 Idaho 179, 657 P.2d 476 (1983).

Normally, an intrauterine device (I.U.D.) in situ will not be considered a foreign object under this section; devices deliberately placed in the body, with the patient's knowledge and consent, which are within the body intentionally are not "foreign objects." Ogle v. De Sano, 107 Idaho 872, 693 P.2d 1074 (Ct. App. 1984).

There was no denial of equal protection under Idaho Const., art. 1, § 2 where a plaintiff was held to the statute of limitations set forth in this section rather than the three year statute for medical malpractice when the cause of action was based upon "foreign objects" or "fraudulent concealment" theories. Ogle v. De Sano, 107 Idaho 872, 693 P.2d 1074 (Ct. App. 1984).

Where an intrauterine device (I.U.D.) was negligently left in the body, after the surgeon represented to the patient that it has been removed, the I.U.D. was no longer deliberately or intentionally within the body; it was inadvertently or unintentionally left in the body; thus the I.U.D. then becomes a foreign object within the meaning of this section. Ogle v. De Sano, 107 Idaho 872, 693 P.2d 1074 (Ct. App. 1984).

Under subdivision 4 of this section, if either the foreign object or the fraudulent concealment exception applies, the cause of action for medical malpractice accrues not when the plaintiff has nonspecific symptoms, but when the plaintiff should reasonably have been on notice of the specific type of injury that was caused by the defendant's tortious act. Allen v. A.H. Robins Co., 752 F.2d 1365 (9th Cir. 1985).

—Fraud and Deceit.

An action for fraud and deceit is not within the purview of a professional malpractice action. Umphrey v. Sprinkel, 106 Idaho 700, 682 P.2d 1247 (1983).

An action for fraud or deceit against a professional is covered by the statute of limitations for fraud, subdivision 4 of § 5-218, rather than the statute of limitations for professional malpractice, subdivision 4 of this section. Umphrey v. Sprinkel, 106 Idaho 700, 682 P.2d 1247 (1983).

Assuming, without deciding, that real estate agents and brokers are professionals for the purpose of subdivision 4 of this section, nevertheless, an action for fraudulent misrepresentation against a real estate agent and broker does not fall within the protective embrace of the professional malpractice statute. Umphrey v. Sprinkel, 106 Idaho 700, 682 P.2d 1247 (1983).

Where the plaintiff alleged that the manufacturer fraudulently concealed from doctors and patients the serious and potentially permanent effects of the Dalkon Shield, this constituted a sufficient allegation that the manufacturer fraudulently concealed the "fact of damage" for which the plaintiff now seeks redress; accordingly, summary judgment was inappropriate. Allen v. A.H. Robins Co., 752 F.2d 1365 (9th Cir. 1985).

When professional malpractice involves fraudulent or intentional concealment of the wrongdoing, even when the initial wrongdoing is merely negligent, the statute of limitations contained in subsection 4 of this section is tolled until the injured party "knows or in the exercise of reasonable care should have been put on inquiry regarding the ... matter complained of," and, after that date, the statute of limitations period is one year, after which an action for professional malpractice is barred. McCoy v. Lyons, 120 Idaho 765, 820 P.2d 360 (1991).

—License Required.

There exists at a minimum a threshold requirement that the person, firm, association, entity or corporation be licensed to perform such services and if the particular defen-

dant is not so licensed to perform the type of service rendered, then the provision creating a two-year statute of limitations for professional malpractice is not applicable. Owyhee County v. Rife, 100 Idaho 91, 593 P.2d 995 (1979).

In June 1971, the defendants were not "certified public accountants," and at that time they clearly were not engaged in professional services for which they were licensed; therefore, the alleged acts of malpractice of the defendants cannot be denominated as of June, 1971 to be "professional malpractice" and hence the two-year limitation period is inapplicable to the causes of action against them relating to that fiscal year (1970). Owyhee County v. Rife, 100 Idaho 91, 593 P.2d 995 (1979).

Subdivision 4 of this section did not apply in an action alleging negligence in the installation of a water system, where neither the defendant nor the contractor hired to install the water system were licensed plumbers. Hibbler v. Fisher, 109 Idaho 1007, 712 P.2d 708 (Ct. App. 1985).

—Limitations.

Summary judgment on ground that action was barred by statute of limitations was improperly granted in medical malpractice action where there was an issue of material fact as to the date on which plaintiff was informed by surgeon that the foreign body appearing in X rays was not an undissolved suture but was a piece of a surgical drain which had not been removed after surgery. Reis v. Cox, 104 Idaho 434, 660 P.2d 46 (1982).

Where plaintiff in medical malpractice action consulted numerous doctors, none of whom ever suggested that the cause of her condition was a foreign object which was left in her body after surgery, plaintiff could not be attributed with sufficient knowledge as a result of such evaluations to put her "on inquiry regarding the condition or matter complained of" within the meaning of subdivision 4 of this section. Reis v. Cox, 104 Idaho 434, 660 P.2d 46 (1982).

In medical malpractice suit, summary judgment on the grounds that the action was barred by the statute of limitations was properly granted where a woman discovered that an intrauterine device (I.U.D.) was still in her body on February 21, 1979, even though it was supposed to have been removed on April 28, 1977 and her malpractice suit was not filed until May 2, 1980 — three years after the negligent act and 14 and one-half months after the discovery of the I.U.D. Ogle v. De Sano, 107 Idaho 872, 693 P.2d 1074 (Ct. App. 1984).

The date of filing of the panel's decision and recommendations with the state board of medicine establishes the start of the additional 30-day tolling of the statute of limitations contemplated by the legislative scheme; if the panel is unable to decide the issues before it within 90 days, and it summarily concludes the proceedings, the date of filing a summary conclusion so advising the board of medicine and the parties shall be the date from which the additional 30 days of tolling will begin to run. James v. Buck, 111 Idaho 708, 727 P.2d 1136 (1986).

In a legal malpractice action against a law firm, alleging negligent representation in a bankruptcy proceeding, the district court did not err in granting the summary judgment for the defendant, as the two-year statute of limitations for professional malpractice set forth in subdivision 4 of this section ran from the date that the bankruptcy plan was adopted and the date upon which plaintiff suffered some damage, and the action, which was filed more than two years later, was untimely. Treasure Valley Bank v. Killen & Pittenger, 112 Idaho 357, 732 P.2d 326 (1987).

Where the attorney knew of the injury caused to the client when the property was conveyed to the bona fide purchaser, but failed to disclose this information despite a duty to speak in the attorney-client relationship, the attorney would be estopped to assert a statute of limitation defense to the extent that the client's delay in filing suit against him for malpractice was attributable to his failure to disclose the fact of injury; however, since the client became independently aware of the fact of injury no later than July 14, 1979, even if he had two years thereafter to file suit, his complaint on August 3, 1981, was untimely unless the delay in filing suit was caused by some additional conduct of the attorney, and the attorney's offer to "look into it" following a meeting between the two did not withhold or attempt to conceal any fact of injury to the client so as to create such an estoppel. Zumwalt v. Stephan, Balleisen & Slavin, 113 Idaho 822, 748 P.2d 406 (Ct. App. 1987).

Where release of lis pendens on real property was filed in wrong county on March 13, 1986, third party investor discovered that lis pendens had not been released in proper county and withdrew offer of investment in April, 1987, and cause of action did not accrue until some damage had occurred; since plaintiffs did not suffer damages as contemplated in subsection 4 of this section until withdrawal of investor's financial support, action of legal malpractice filed January 6, 1989 was not barred by two year limitation of subsection 4 of this section. Bonz v. Sudweeks, 119 Idaho 539, 808 P.2d 876 (1991).

For those causes of action sounding in professional malpractice without allegations of fraud, concealment or misrepresentation, such as attorney-defendant's failure to ex-

plain to the heirs the significance of the deeds they were signing, the applicable statute of limitation is two years from the act or occurrence complained of or two years from the date plaintiffs incurred some damage; therefore, the trial court did not err in granting summary judgment on the counts alleging "negligent malpractice" because those claims did not allege fraud, concealment or misrepresentation and clearly accrued in 1977 when the heirs suffered some damage. McCoy v. Lyons, 120 Idaho 765, 820 P.2d 360 (1991).

The doctrine of continuing representation in professional malpractice actions is specifically barred by subsection 4 of this section. Fairway Dev. Co. v. Peterson, Moss, Olsen, Meacham & Carr, 124 Idaho 866, 865 P.2d 957 (1993).

Where there was objective proof that plaintiff suffered some actual damage when the district court dismissed plaintiff's tax assessment claims on November 3, 1988, and where plaintiff did not bring its malpractice claim before the two-year statute of limitations ran on November 3, 1990, plaintiff's suit alleging attorney committed malpractice by failing to appeal tax claims through the proper administrative channels was time barred by the statute of limitations. Fairway Dev. Co. v. Peterson, Moss, Olsen, Meacham & Carr, 124 Idaho 866, 865 P.2d 957 (1993).

Plaintiffs suffered "some damage" when they retained new tax counsel to resist I.R.S. claims, and the two-year statute of limitations contained in subsection 4 of this section began to run at that time. Elliott v. Parsons, 128 Idaho 723, 918 P.2d 592 (1996).

The plaintiff suffered some damage when the limitation period for bringing an action against the debtor expired, and the two-year statute of limitations for a malpractice action against the plaintiff's attorney began to run at that time. Because the plaintiff delayed for more than two years before bringing the malpractice action, the plaintiff's action was barred by the statute of limitation. Figueroa v. Merrick, 128 Idaho 840, 919 P.2d 1041 (Ct. App. 1996).

Two-year statute of limitations of subsection 4 of this section did not apply to the buyers' suit against the real estate company and realtor where real estate agents did not provide professional services for purposes of subsection 4 of this section, and including real estate agents as rendering professional services would be inconsistent with the legislative intent in establishing a definition of professional services. Sumpter v. Holland Realty, Inc., 140 Idaho 349, 93 P.3d 680 (2004).

—Occurrence of Damage.

In many medical malpractice cases, the damage occurs contemporaneously with the negligent act, however, in some instances the damage may not occur until some time after the negligent act; in such cases, the statute does not begin to run until the occurrence of damage, and this is so because a cause of action cannot successfully be brought until some damage exists. Hawley v. Green, 117 Idaho 498, 788 P.2d 1321 (1990).

Defendants pleading statute of limitations in a medical malpractice case had the burden of going forward with uncontradicted evidence showing that a tumor which appeared on the X-rays taken in excess of two years prior to commencement of action was progressive or otherwise dangerous to the health of the plaintiff, in order to establish that the plaintiff had incurred some damage at that time. Hawley v. Green, 117 Idaho 498, 788 P.2d 1321 (1990).

The determination of what constitutes "damage" for purposes of accrual of an action must be decided on the circumstances presented in each individual case. Bonz v. Sudweeks, 119 Idaho 539, 808 P.2d 876 (1991).

This section requires that "some damage" occur before the action for malpractice accrues and the limitation period begins to run. Bonz v. Sudweeks, 119 Idaho 539, 808 P.2d 876 (1991).

The "objectively ascertainable damage" standard provides an additional analytical tool to use in determining when "some damage" has occurred in all types of professional malpractice cases. Chicoine v. Bignall, 122 Idaho 482, 835 P.2d 1293 (1992).

Summary judgment barring medical claim based on statute of limitations was vacated, where determining time at which plaintiff was "damaged" could not be determined with medical certainty. Hawley v. Green, 124 Idaho 385, 860 P.2d 1 (Ct. App. 1993).

Where there was objective proof that plaintiff suffered some actual damage when the district court dismissed plaintiff's tax assessment claims on November 3, 1988, and where plaintiff did not bring its malpractice claim before the two-year statute of limitations ran on November 3, 1990, plaintiff's suit alleging attorney committed malpractice by failing to appeal tax claims through the proper administrative channels was time barred by the statute of limitations. Fairway Dev. Co. v. Peterson, Moss, Olsen, Meacham & Carr, 124 Idaho 866, 865 P.2d 957 (1993).

For the purposes of determining the date of accrual of a cause of action for a malpractice claim against attorney who handled a foreclosure action by bank against clients, "some damage" occurred on the date of the order of summary judgment against clients; the subsequent date of judgment and decree of foreclosure only established the amount of the damage award. Webster v. Hoopers, 126 Idaho 96, 878 P.2d 795 (Ct. App. 1994).

Because Idaho is not a discovery jurisdiction, the claims of brothers, alleging they had been sexually abused by a priest over twenty years earlier, were barred by the two-year statute of limitations in subsection 4 of this section because some objectively ascertainable damage occurred when the alleged abuse took place, even though the full effect may not have been experienced until years later. Bonner v. Roman Catholic Diocese, 128 Idaho 351, 913 P.2d 567 (1996).

Legal malpractice action was barred by a two-year statute of limitations because "some damage" occurred when property was transferred to a trust to gain a tax advantage since two clients could have reformed the trust at that time to correct any defects; therefore, a district court did not err by granting summary judgment in favor of several lawyers. Anderson v. Glenn, 139 Idaho 799, 87 P.3d 286 (2003).

Personal Injury Actions.

Action for malicious prosecution is not governed by subd. 4 or 5 of this section. Barton v. Woodward, 32 Idaho 375, 182 P. 916 (1919).

In action commenced in 1955 to recover general and special damages for personal injuries arising out of an automobile accident occurring in 1952, it was held that a statute which tolls the running of the statute of limitations when the defendant is out of the state when the cause of action accrues or departs from the state thereafter will be given effect even though service could have been obtained on an involuntary agent, in this case the secretary of state, during his absence. Staten v. Weiss, 78 Idaho 616, 308 P.2d 1021 (1957), overruled in part, Lipe v. Javelin Tire Co., 96 Idaho 723, 536 P.2d 291 (1975).

Both the builder and the owner of a building are covered by subdivision 4 of this section which contains the statute of limitations not only for professional malpractice actions and wrongful death actions, but, also, for actions to recover damages for an injury to the person and where causes of action were all based upon an injury plaintiff sustained due to the alleged negligence of architect, builder and owner, the limitation period of subdivision 4 of this section applied to all of the defendants. Stephens v. Stearns, 106 Idaho 249, 678 P.2d 41 (1984).

Civil rights claims in this state pursuant to 42 U.S.C. § 1983 must meet the two-year statute of limitations for personal injury actions under subdivision 4 of this section. Henderson v. State, 110 Idaho 308, 715 P.2d 978, cert. denied, 477 U.S. 907, 106 S. Ct. 3282, 91 L. Ed. 2d 571 (1986).

In claims for defamation and negligent infliction of emotional distress against defendants who were former clients claiming plaintiff had given them unsuitable investment recommendations that led to the Idaho department of finance denying plaintiffs' applications for securities licenses, because the orders denying the applications were entered more than two years before the original complaint was filed, the district court was correct in concluding the claims were time barred under subsections 4 and 5 of this section. Rincover v. State, Dep't of Fin., 128 Idaho 653, 917 P.2d 1293 (1996).

Minor's claim involving sexual abuse against a school district, brought pursuant to 42 U.S.C. § 1983, was subject to the two-year limitations period under subdivision 4 of this section, not § 6-1704, the statute of limitations for filing tort actions in child abuse cases. Osborn v. Salinas, 131 Idaho 456, 958 P.2d 1142 (1998).

Where plaintiff's amended complaint against the decedent's estate on his claim for personal injuries was filed nearly one year after the expiration of the two-year statute of limitations, his claim was time-barred unless it related back to the date of filing of the original complaint. Damian v. Estate of Pina, 132 Idaho 447, 974 P.2d 93 (Ct. App. 1999).

The relation back doctrine can not be satisfied where plaintiff's original complaint was not served before the two-year statute of limitation for personal injury actions expired. Noreen v. Price Dev. Co., 135 Idaho 816, 25 P.3d 129 (Ct. App. 2001).

—Negligent Design and Construction.

A personal injury action founded upon the negligent design or construction of an improvement to real property must be brought within two years of the injuries, and in no event later than eight years following the completion of construction. Barab v. Plumleigh, 123 Idaho 980, 853 P.2d 635 (Ct. App. 1993).

Where homeowner commenced her personal injury action against previous homeowner within two years of sustaining injuries from the explosion of a woodburning stove, but where the construction of the stove, including the log-lighter device, was completed more than eight years before homeowner filed her complaint, her claim seeking to find the previous homeowner liable for the negligent design and construction of the stove was time-barred and properly dismissed. Barab v. Plumleigh, 123 Idaho 980, 853 P.2d 635 (Ct. App. 1993).

—Section 1983 Actions.

Because actions under 42 U.S.C. 1983 are analogous to actions for injuries to personal rights, they are subject to the state statute of limitations for personal injury actions. The pertinent Idaho statute is subdivision 4 of this section, which provides a two-year statute of limitations for actions based on personal injury. Samuel v. Michaud, 980 F. Supp.

1381 (D. Idaho 1996), aff'd, 129 F.3d 127 (9th Cir. 1997).

District court properly applied Fed. R. Civ. P. 12(c) in granting summary judgment under Fed. R. Civ. P. 56 in favor of the Idaho state board of medicine and the Idaho state board of medicine board of professional discipline in a physician assistant's action under 42 U.S.C.S. § 1983, which claimed that a protracted administrative process motivated by religious discrimination against Mormons precluded the reinstatement of her physician assistant's license; several of the boards' acts occurred outside the applicable two-year statute of limitations under subdivision 4 of this section, and the remaining acts were sufficiently judicial and prosecutorial to entitle the boards to absolute immunity. Olsen v. Idaho State Bd. of Med., 363 F.3d 916 (9th Cir. 2004).

Professional Service.

Defendant, as a licensed certified public accountant, was engaged in a "professional service" when he participated in the audit of the account of Owyhee County. Owyhee County v. Rife, 100 Idaho 91, 593 P.2d 995 (1979).

This section expressly prohibits extending the statute of limitation period by reason of any continuing professional relationship between the injured party and the alleged wrongdoer. Ogle v. De Sano, 107 Idaho 872, 693 P.2d 1074 (Ct. App. 1984).

Where the corporation committed wrongful acts or omissions within the course of performing its professional services, the company's claim was properly characterized as a professional malpractice claim; therefore, it was time-barred by the two-year statute of limitations provided by subdivision 4 of this section. Nerco Minerals Co. v. Morrison Knudsen Corp., 140 Idaho 144, 90 P.3d 894 (2004).

Tolling of Statute.

Plaintiff's claim that she did not discover the cause of her daughter's birth defect until approximately eight years after her daughter's birth did not serve to toll the statute of limitations, as there is no "discovery" exception except for the leaving of foreign objects in the body. Cosgrove ex rel. Winfree v. Merrell Dow Pharmaceuticals, Inc., 117 Idaho 470, 788 P.2d 1293 (1990).

Violation of Idaho Communications Security Act.

Where employee brought an action against employer alleging violation of the Idaho communications security act (see § 18-6701 et seq.) for secretly recording her telephone conversations, district court correctly held that no discovery exception to the statute of limitations was created by the Idaho communication security act; employee brought the action more than three years after the last day of wiretapping occurred. Knudsen v. Agee, 128 Idaho 776, 918 P.2d 1221 (1996).

Wiretapping.

Based on its determination that in the case of wiretapping the damage is immediate, the supreme court of Idaho held that the statute of limitations begins to run no later than the last day of wiretapping. Knudsen v. Agee, 128 Idaho 776, 918 P.2d 1221 (1996).

Worker's Compensation Claims.

Claim against insurance company insuring an employer under workmen's [now worker's] compensation act (see § 72-101 et seq.) was not barred because insurance company was not made a party to the proceedings before the industrial accident board against the employer. Hauter v. Coeur d'Alene Antimony Mining Co., 39 Idaho 621, 228 P. 259 (1924).

Wrongful Death Actions.

Where wrongful death actions were filed some 18 and 19 years after the decedent's death and the plaintiff survivors had not suffered from any disability during those years preceding the filing of their complaints, their claims were clearly barred by the statute of limitations set out in this section. Brackney v. Combustion Eng'g, Inc., 674 F.2d 812 (9th Cir. 1982).

The "occurrence, act or omission" which this section defines as the accrual of a cause of action for wrongful death refers to the death of the person, caused by the wrongful acts of another, and the running of the statute of limitation on the wrongful death cause of action begins from the date of death. Chapman v. Cardiac Pacemakers, Inc., 105 Idaho 785, 673 P.2d 385 (1983).

Cited in: State v. Prieto, 120 Idaho 884, 820 P.2d 1241 (Ct. App. 1991); 9 A.L.R.3d 955; State v. Gallegos, 120 Idaho 894, 821 P.2d 949 (1991); Leazer v. Kiefer, 120 Idaho 902, 821 P.2d 957 (1991); Westfall v. Caterpillar, Inc., 120 Idaho 918, 821 P.2d 973 (1991); Lind v. Rockland Sch. Dist., 120 Idaho 928, 821 P.2d 983 (1991); Idaho County Nursing Home v. Idaho Dep't of Health & Welfare, 120 Idaho 933, 821 P.2d 988 (1991); Ernst v. Hemenway & Moser Co., 120 Idaho 940, 821 P.2d 995 (1991); Ernst v. Hemenway & Moser Co., 120 Idaho 941, 821 P.2d 996 (Ct. App. 1991), modified, 126 Idaho 980, 895 P.2d 581 (1995); State v. Grove, 120 Idaho 950, 821 P.2d 1005 (Ct. App. 1991); State v. Estes, 120 Idaho 953, 821 P.2d 1008 (Ct. App. 1991); State v. King, 120 Idaho 955, 821 P.2d 1010, 821 P.2d 1010 (Ct. App. 1991); State v. Smith, 120 Idaho 961, 821 P.2d 1016 (Ct. App. 1991); Brazier v. Brazier, 111 Idaho 692, 726 P.2d 1143 (1986); State v. Leavitt, 121 Idaho 4, 822 P.2d 523

(1991), cert. denied, 506 U.S. 972, 113 S. Ct. 460, 121 L. Ed. 2d 368 (1992); State v. Walker, 121 Idaho 18, 822 P.2d 537 (Ct. App. 1991); State v. Smith, 121 Idaho 20, 822 P.2d 539 (Ct. App. 1991); Goerig v. State, 121 Idaho 26, 822 P.2d 545 (Ct. App. 1991); George v. University of Idaho, 121 Idaho 30, 822 P.2d 549 (Ct. App. 1991); Hoff Cos. v. Danner, 121 Idaho 39, 822 P.2d 558 (Ct. App. 1991); State v. Elliott, 121 Idaho 48, 822 P.2d 567 (Ct. App. 1991); State v. Soto, 121 Idaho 53, 822 P.2d 572 (Ct. App. 1991); State v. Rhoades, 121 Idaho 63, 822 P.2d 960 (1991), cert. denied, 506 U.S. 1047, 113 S. Ct. 962, 122 L. Ed. 2d 119 (1993); Idaho First Nat'l Bank v. Bliss Valley Foods, Inc., 121 Idaho 266, 824 P.2d 841 (1991); Curtis v. Firth, 123 Idaho 598, 850 P.2d 749 (1993); Hallstrom v. City of Garden City, 991 F.2d 1473 (9th Cir. 1993); Watts v. Lynn, 125 Idaho 341, 870 P.2d 1300 (1994); Jones v. Kootenai County Title Ins. Co., 125 Idaho 607, 873 P.2d 861 (1994); J.R. Simplot Co. v. Chemetics Int'l, Inc., 126 Idaho 532, 887 P.2d 1039 (1994).

RESEARCH REFERENCES

Am. Jur. — 36 Am. Jur. 2d, Forfeitures and Penalties, §§ 75 to 76.

50 Am. Jur. 2d, Libel and Slander, § 404 et seq.

51 Am. Jur. 2d, Limitation of Actions, §§ 142 to 146.

63C Am. Jur. 2d, Public Officers and Employees, §§ 485 to 489.

70 Am. Jur. 2d, Sheriffs, Police and Constables, § 115 et seq.

C.J.S. — 54 C.J.S., Limitations of Actions, § 100 et seq.

A.L.R. — Attorney Malpractice — Tolling or Other Exceptions to Running of Statute of Limitations. 87 A.L.R.5th 473.

Insurance agents or brokers as professionals or nonprofessionals for purposes of malpractice statutes of limitations. 121 A.L.R.5th 365.

5-220. Actions for wrongful seizure by officers. — Within one (1) year: An action against an officer or officer de facto:

To recover any goods, wares, merchandise or other property seized by any such officer in his official capacity as tax collector, or to recover the price or value of any goods, wares, merchandise, or other personal property so seized, or for damages for the seizure, detention, sale of or injury to, any goods, wares, merchandise, or other personal property seized, or for damages done to any person or property in making any such seizure.

History.

C.C.P. 1881, § 160; R.S., R.C., & C.L., § 4056; C.S., § 6613; am. 1921, ch. 108, § 1, p. 250; I.C.A., § 5-220.

RESEARCH REFERENCES

C.J.S. — 54 C.J.S., Limitations of Actions, § 102.

5-221. Actions on claims against county. — Actions on claims against a county which have been rejected by the board of commissioners must be commenced within six (6) months after the first rejection thereof by such board.

History.

C.C.P. 1881, § 161; R.S., R.C., & C.L., § 4057; C.S., § 6614; I.C.A., § 5-221.

JUDICIAL DECISIONS

Wrongful Death Action.

Where wrongful death action against the county was grounded in tort, the more specific statute of limitations, the two-year bar of § 6-911 controlled rather than the six-month bar of this section. Walker v. Shoshone County, 112 Idaho 991, 739 P.2d 290 (1987).

Cited in: Bannock County v. Bell, 8 Idaho 1, 65 P. 710 (1901); Gwinn v. Melvin, 9 Idaho 202, 72 P. 961 (1903); Weil v. Defenbach, 31 Idaho 258, 170 P. 103 (1918); Boise Valley Traction Co. v. Ada County, 38 Idaho 350, 222 P. 1035 (1923); Billings v. Sisters of Mercy, 86 Idaho 485, 389 P.2d 224 (1964).

RESEARCH REFERENCES

Am. Jur. — 51 Am. Jur. 2d, Limitation of Actions, § 74.

C.J.S. — 20 C.J.S., Counties, § 413.

5-222. Actions on open accounts — Accrual of cause. — In an action brought to recover a balance due upon a mutual, open and current account, where there have been reciprocal demands between the parties, the cause of action is deemed to have accrued from the time of the last item proved in the account on either side.

History.

C.C.P. 1881, § 162; R.S., R.C., & C.L., § 4050; C.S., § 6615; I.C.A., § 5-222.

JUDICIAL DECISIONS

Analysis

Application of section.
Last item proved.
Mandamus action to compel reassessment.

Application of Section.

This section has no application to fees charged by the county for recording of instruments. Lincoln County v. Twin Falls N. Side Land & Water Co., 23 Idaho 433, 130 P. 788 (1913).

Action on account for services of a farm laborer was an action to recover a balance due on a mutual, open and current account. McCarthy v. Paris, 46 Idaho 165, 267 P. 232 (1928).

Last Item Proved.

History and precedent suggest that the appropriate definition of the term "item" is the final underlying transaction, and this interpretation conforms with the admission rationale which gave rise to the statutory language and is in harmony with case law. Eagle Water Co. v. Roundy Pole Fence Co., 134 Idaho 626, 7 P.3d 1103 (2000).

Mandamus Action to Compel Reassessment.

Where a mandamus to compel reassessment of property within a special or local improvement district was brought some eighteen months after actual notice of the deficiency through the city clerk's fault, the action was not barred by limitation. Maguire v. Whillock, 63 Idaho 630, 124 P.2d 248 (1942).

Cited in: Bannock County v. Bell, 8 Idaho 1, 65 P. 710 (1901); Gwinn v. Melvin, 9 Idaho 202, 72 P. 961 (1903); Fidelity Trust Co. v. State, 72 Idaho 137, 237 P.2d 1058 (1951); Billings v. Sisters of Mercy, 86 Idaho 485, 389 P.2d 224 (1964).

RESEARCH REFERENCES

C.J.S. — 54 C.J.S., Limitations of Actions, § 177 et seq.

5-223. Actions to recover deposits — Commencement of limitation. — To actions brought to recover money or property deposited with any

bank, banker, trust company or saving and loan society, no limitation begins to run until after an authorized demand.

History.
C.C.P. 1881, § 163; R.S., R.C., & C.L., § 4059; C.S., § 6616; I.C.A., § 5-223.

JUDICIAL DECISIONS

ANALYSIS

Applied by federal courts.
Commencement of running by statute.
Special deposits.

Applied by Federal Courts.
The federal courts may give force and effect to this statute when the proceedings therein are governed by the laws of Idaho. Jones v. Jenkins, 22 F.2d 642 (8th Cir. 1927).

Commencement of Running by Statute.
Statute does not begin to run until after demand by depositor. Bates v. Capital State Bank, 18 Idaho 429, 110 P. 277 (1910).

Special Deposits.
Where action is brought to recover money deposited with bank, statute does not begin to run until after demand by depositor, even though deposit is special. Prewett v. First Nat'l Bank, 45 Idaho 451, 262 P. 1057 (1928).

Cited in: Bannock County v. Bell, 8 Idaho 1, 65 P. 710 (1901); Gwinn v. Melvin, 9 Idaho 202, 72 P. 961 (1903); Bates v. Capital State Bank, 18 Idaho 429, 110 P. 277 (1910); Common School Dist. No. 18 v. Twin Falls State Bank & Trust Co., 52 Idaho 200, 12 P.2d 774 (1932); Billings v. Sisters of Mercy, 86 Idaho 485, 389 P.2d 224 (1964).

RESEARCH REFERENCES

C.J.S. — 9 C.J.S., Banks and Banking, § 337.

54 C.J.S., Limitations of Actions, § 239 et seq.

5-224. Actions for other relief. — An action for relief not hereinbefore provided for must be commenced within four (4) years after the cause of action shall have accrued.

History.
C.C.P. 1881, § 164; R.S., R.C., & C.L., § 4060; C.S., § 6617; I.C.A., § 5-224.

JUDICIAL DECISIONS

ANALYSIS

Abuse of process.
Actions upon foreign judgment.
Amendment of complaint.
Annulment of ordinance.
Appointment of administrator.
Bank deposits, recovery of.
Breach in tort.
Breach of trust.
Constructive trust.
Counterclaims.
Damage to environment.
Damages.
Distribution of estate.
Enforcement of public right.
Environmental protection and health.
Fiduciary duty.

Funds in court.
Inverse condemnation.
Malpractice.
Mandamus action to compel reassessment.
Negligence.
Nuisance.
Periodic floodings.
Public duties and rights.
Public officers.
Real property, damages.
Regulatory takings.
Revival of judgment.
Suit by state.
Unlicensed professional service.

Abuse of Process.

The four-year statute of limitations contained in this section applies to abuse of process claims, instead of the two-year statute of limitations under § 5-219. Gowin v. Altmiller, 663 F.2d 820 (9th Cir. 1981). But see Idaho State Bar v. Tway, 128 Idaho 794, 919 P.2d 323 (1996).

Actions upon Foreign Judgment.

An action on a Canadian judgment, which was not specifically provided for by any other section of the statute of limitations provisions, fell within the purview of this section; in order to successfully assert the statute of limitations as a bar to this action defendant must show he had resided in Idaho for more than four years. Attorney Gen. ex rel. Her Majesty the Queen in Right of Can. v. Tysowski, 118 Idaho 737, 800 P.2d 133 (Ct. App. 1990).

Amendment of Complaint.

If the amendment introduces a new or different cause of action and makes a new or different demand, the statute continues to run until the amendment is filed. Denton v. Detweiler, 48 Idaho 369, 282 P. 82 (1929).

Annulment of Ordinance.

An action to have ordinances vacating streets and alleys of a city declared null and void, and to compel the removal of obstructions from the streets, should have been commenced within at least five years from the time the cause of action arose and is barred where the ordinances were passed in 1900, and the action was not commenced until 1909. Canady v. Coeur d'Alene Lumber Co., 21 Idaho 77, 120 P. 830 (1911).

Appointment of Administrator.

A proceeding for the appointment of an administrator is an action within the meaning of this section and it is barred if not commenced within four years from the death of the decedent. Gwinn v. Melvin, 9 Idaho 202, 72 P. 961 (1903).

Bank Deposits, Recovery of.

In action to recover money deposited in bank and applied to note of depositor, four-year statute applies and time begins to run from demand by depositor. Prewett v. First Nat'l Bank, 45 Idaho 451, 262 P. 1057 (1928).

Breach in Tort.

Four-year statute of limitations applied to the buyers' cause of action against the real estate company and realtor where, although the duties owed to the buyers were clearly statutory, the buyers had to deal with the breaches in tort, not contract. Sumpter v. Holland Realty, Inc., 140 Idaho 349, 93 P.3d 680 (2004).

Breach of Trust.

The general rule is that length of time is no bar to a trust, clearly established, and that express trusts are not within the statute of limitations; but that rule is subject to the qualification that time begins to run against a trust as soon as it is openly disavowed by the trustee, which disavowal or repudiation is clearly and unequivocally made known to the cestui que trust. Olympia Mining & Milling Co. v. Kerns, 24 Idaho 481, 135 P. 255 (1913), appeal dismissed, 236 U.S. 211, 35 S. Ct. 415, 59 L. Ed. 542 (1915).

The period of limitation against a continuing, express or voluntary, trust is four years, dating from notice to the cestui que trust of its termination. Brasch v. Brasch, 55 Idaho 777, 47 P.2d 676 (1935).

Action against officer for breach of trust accrues on discovery of breach. Cruzen v. Boise City, 58 Idaho 406, 74 P.2d 1037 (1937).

Action against vendor for breach of implied trust accrues on date of notice of repudiation and sale of property to another. Shepherd v. Dougan, 58 Idaho 543, 76 P.2d 442 (1937).

Counterclaim by corporation to recover damages from officer of corporation for breach of trust is not controlled by 3 year statute set forth in § 5-218 but is governed by four year statutes set forth in § 5-217 and this section. Melgard v. Moscow Idaho Seed Co., 73 Idaho 265, 251 P.2d 546 (1952).

Action for breach of voting trust arising from the dilution of the beneficiary's ownership interest in the bank as a result of the

employee stock option plan accrued when the dilution occurred; therefore, where the dilution occurred six years before the action was filed, the claim was barred under both this section and § 15-7-307. First Bank & Trust v. Jones, 111 Idaho 481, 725 P.2d 186 (Ct. App. 1986).

Constructive Trust.

Any claim by the beneficiary of decedent's life insurance policy for constructive trust accrued at the time the insurance policy proceeds were distributed, and, where the claim was not filed until five years later, the claim was barred by the four year limitation contained in either § 5-217 or this section. Witt v. Jones, 111 Idaho 165, 722 P.2d 474 (1986).

Counterclaims.

Where both complaint and defendant's counterclaim were based on a logging contract, defendant's cross demands could be pleaded defensively; therefore, the striking of defendant's counterclaims was erroneous, as they were not barred under this section or § 5-217. Kelson v. Ahlborn, 87 Idaho 519, 393 P.2d 578 (1964).

Damage to Environment.

Where the defendants argued that it was undisputed that there had been no injury to the environment for four years prior to the date of the filing of the complaint but the state submitted affidavits and documents which suggested that damage to the environment continued, even though there had been an overall improvement in the environmental outlook for the area, summary judgment was inappropriate. Idaho v. Bunker Hill Co., 635 F. Supp. 665 (D. Idaho 1986).

Damages.

Where water heater was installed without pressure release valve and exploded 18 years later, cause of action for damages caused by explosion occurred at the time of the explosion, notwithstanding that plaintiff knew, at the time of installation, of the failure to install the valve, and action brought within one year from explosion was not barred. Galbraith v. Vangas, Inc., 103 Idaho 912, 655 P.2d 119 (Ct. App. 1982).

This section applies to an action for damages to fixtures or to real property. Hibbler v. Fisher, 109 Idaho 1007, 712 P.2d 708 (Ct. App. 1985).

Where plaintiffs in an action alleging negligence in the installation of a water system did not discover latent defects before the end of the six-year accrual period allowed by § 5-241, they had four more years under this section in which to file the negligence action. Since the action was commenced within the ten-year period, the negligence count was not barred by the applicable statute of limitation. Hibbler v. Fisher, 109 Idaho 1007, 712 P.2d 708 (Ct. App. 1985).

Distribution of Estate.

In the matter of a petition of heirs at law of two French legatees of an Idaho testator, who died intestate during the pendency of the administration of the testator's estate, for distribution to them as such heirs at law, this section did not begin to run so long as the executor had not taken a position hostile to that of the petitioners. Barthel v. Johnston, 92 Idaho 94, 437 P.2d 366 (1968).

Enforcement of Public Right.

Where the actions of the department of transportation were consistent with the exercise of its police powers, as authorized by the legislature, their actions were not barred by the statute of limitations, because statutes of limitations do not operate against the state when the state is acting in its sovereign capacity to enforce a public right. Young Elec. Sign Co. v. State ex rel. Winder, 135 Idaho 804, 25 P.3d 117 (2001).

Environmental Protection and Health.

Since Idaho's Environmental Protection and Health Act (§ 39-101 et seq.) does not provide its own statute of limitation, the four-year limitation provided by this section applies to actions brought under it. Aetna Cas. & Sur. Co. v. Gulf Resources & Chem. Corp., 600 F. Supp. 797 (D. Idaho 1985).

Fiduciary Duty.

Where a claim for breach of fiduciary duty was not covered by any of the other specific statutes of limitations, the court applied the four-year statute of limitations contained in this section. Jones v. Kootenai County Title Ins. Co., 125 Idaho 607, 873 P.2d 861 (1994).

Funds in Court.

Where proceeds of the sale of property were deposited in a court pursuant to a stipulation entered into by the parties under the terms of which it was to be turned over to the one ultimately entitled thereto, the claim of the assignee, of one of the defendants to that portion of the proceeds attached by the plaintiff as property of such defendant, although presented by the proceeding in intervention, more than four years after the attachment but prior to the trial of the case, was not barred by limitation since it was filed before the trial and was, therefore, timely. Anderson v. Ferguson, 56 Idaho 554, 57 P.2d 325 (1936).

Inverse Condemnation.

The plaintiff's claim in inverse condemnation accrued when the court issued an injunction against the plaintiff's continued construction of its apartment complex, and the plaintiff's cause of action was untimely where it was filed more than four years after the

issuance of the injunction. Intermountain W., Inc. v. Boise City, 111 Idaho 878, 728 P.2d 767 (1986).

Because landowner, suing department of transportation for inverse condemnation based on gravel excavation conducted upstream of his property, was aware of some effect the excavation had on his property at least as early as 1976 when he filed a claim under the Idaho tort claims act (see § 6-901 et seq.), the limitations period set forth in this section had run before he filed his claim for inverse condemnation in 1990; summary judgment in favor of department was affirmed. Higginson v. Wadsworth, 128 Idaho 439, 915 P.2d 1 (1996).

Project completion rule was the proper standard for determining when a claim for inverse condemnation accrued for purposes of the statute of limitations; therefore, the corporation's complaint for inverse condemnation was timely filed because the highway district did not substantially complete construction of the road until May 1993. C & G, Inc. v. Canyon Highway Dist. No. 4, 139 Idaho 140, 75 P.3d 194 (2003).

Section 40-202 was not unconstitutional on its face; if a landowner believed the acquisition of a roadway pursuant to § 40-202 resulted in a taking, the landowner had four years, pursuant to this section, from the accrual of the cause of action to bring a claim of inverse condemnation. Ada County Highway Dist. v. Total Success Invs., LLC, 145 Idaho 360, 179 P.3d 323 (2008).

Where the state claimed incorrectly that it owned mineral rights to property owned by the plaintiffs, and the plaintiffs entered into a lease with the state to allow the owners to mine gravel and sand for sale on a royalty basis, the time limitation for a claim of inverse condemnation began to run at the time the lease was signed. Harris v. State Ex Rel. Kempthorne, 147 Idaho 401, 210 P.3d 86 (2009).

Malpractice.

Legal malpractice cause of action brought by decedent's sons in 1974 in regard to probate of father's estate in 1954 accrued in 1954 at the time of the alleged negligence, rather than in 1972 when the alleged negligence was discovered; thus, whether the limitation in this section or § 5-217 was applicable, the action was barred, having been brought more than four years after its occurrence. Martin v. Clements, 98 Idaho 906, 575 P.2d 885 (1978).

Mandamus Action to Compel Reassessment.

Where a mandamus to compel reassessment of property within a special or local improvement district was brought some eighteen months after actual notice of the deficiency through the city clerk's fault, the action was not barred by limitation. Maguire v. Whillock, 63 Idaho 630, 124 P.2d 248 (1942).

Negligence.

Debtor's suit for negligence, against bank issuing credit card, based on the erroneous reporting of credit information, was not barred by the statute of limitations because the first negligent act committed by bank occurred when bank received payment in full from the debtors, credited the check against the outstanding balance, and continued to characterize the account as "charged off," and this occurred within four years. Hoglan v. First Sec. Bank, 120 Idaho 682, 819 P.2d 100 (1991).

Nuisance.

Where a complaint of nuisance is permanent, the cause of action must be commenced within four years from the date the permanent nuisance was created or occurred; where the nuisance is temporary and continuing in nature, the statute of limitations does not run and an action may be brought at any time to recover damages occurring within the previous limitation period. Aetna Cas. & Sur. Co. v. Gulf Resources & Chem. Corp., 600 F. Supp. 797 (D. Idaho 1985).

Where a nuisance is permanent, the cause of action must be commenced within four years from the date the permanent nuisance was created or occurred; where the nuisance is temporary and continuing in nature, the statute of limitations does not run and an action may be brought at any time to recover damages occurring within the previous limitation period. Idaho v. Hanna Mining Co., 699 F. Supp. 827 (D. Idaho 1987), aff'd, 882 F.2d 392 (9th Cir. 1989).

Action for damages to mining ground from oil and grease deposited in stream was governed by this section. Idaho Gold Dredging Corp. v. Boise Payette Lumber Co., 52 Idaho 766, 22 P.2d 147 (1933).

Periodic Floodings.

In cases of repeated or periodic floodings, each constitutes a separate and distinct cause of action, and the statute begins to run from the date of each periodic flooding. Lavin v. Panhandle Lumber Co., 51 Idaho 1, 1 P.2d 186 (1931).

Public Duties and Rights.

Where the duty to be performed or the right to be enforced is of a strictly public nature, they are not subject to the law of limitations. Elmore County v. Alturas County, 4 Idaho 145, 37 P. 349 (1894).

Public Officers.

An action by a county to recover from the clerk of court, auditor and recorder moneys illegally allowed by the county commissioners to the clerk, etc., and fees illegally collected by

the clerk, etc., from the county is barred after four years. Bannock County v. Bell, 8 Idaho 1, 65 P. 710 (1901).

An action against officer for breach of trust accrues on discovery of breach. Cruzen v. Boise City, 58 Idaho 406, 74 P.2d 1037 (1937).

An inmate's claims against a court reporter for fraud and negligence and tortious interference with rights of citizenship were time barred by §§ 5-218, 5-219, and this section where the claims were filed more than four years after time inmate's attorney, through due diligence, could have discovered alleged omissions in trial transcript. Mason v. Tucker & Assocs., 125 Idaho 429, 871 P.2d 846 (Ct. App. 1994).

Real Property, Damages.

Actions for damages against real property come under this section. Boise Dev. Co. v. Boise City, 30 Idaho 675, 167 P. 1032 (1917).

Action to recover damages for injury to pasture and growing crops due to obstruction of watercourse was an action on the case for consequential damages to real property, and statute of limitations was not the three year statute for actions of trespass upon real property as set out in § 5-218, but the four year statute set forth in this section. Woodland v. Lyon, 78 Idaho 79, 298 P.2d 380 (1956).

Plaintiff could recover damages for injury to real property as the result of obstruction of watercourse for period of four years prior to filing of suit though obstruction occurred more than four years prior to institution of suit, since the tort involved was a continuing wrong. Woodland v. Lyon, 78 Idaho 79, 298 P.2d 380 (1956).

Regulatory Takings.

Regulatory takings claim was not time barred because the claims did not accrue upon the enactment of the regulations. One party was not aware of the claim until a 1997 decision, and a city brought an action to require the removal of fences from property later acquired by that party in 1997. City of Coeur d'Alene v. Simpson, 142 Idaho 839, 136 P.3d 310 (2006).

Revival of Judgment.

Action to revive a judgment after failure of title on execution sale was governed by four-year statute. Gertztowt v. Humphrey, 53 Idaho 631, 27 P.2d 64 (1933).

In mechanic's lien foreclosure, where two judgment claimants assigned their judgments to another judgment claimant and heirs of deceased owner assigned their interest to same assignee so as to cause a merger of the liens with the title, an unassigned recorded judgment of another claimant is a cloud on the title which must be removed to render same marketable. Brown v. Hawkins, 66 Idaho 351, 158 P.2d 840 (1945), overruled on other grounds, Mitchell v. Flandro, 95 Idaho 228, 506 P.2d 455 (1972).

Suit by State.

The state in bringing suit may not avoid the statute of limitations imposed by this section and § 5-225, absent a showing that the application of a statute of limitations to the state would result in an unconstitutional outcome, or absent a statute immunizing the state from the statute of limitations. Aetna Cas. & Sur. Co. v. Gulf Resources & Chem. Corp., 600 F. Supp. 797 (D. Idaho 1985).

Unlicensed Professional Service.

In June 1971, the defendants were not "certified public accountants," and at that time they clearly were not engaged in professional services for which they were licensed; therefore, the alleged acts of malpractice of the defendants cannot be denominated as of June, 1971 to be "professional malpractice"; hence, the two-year limitation period is inapplicable to the causes of action against them and the applicable statute of limitations would be the four year periods of either § 5-217 or this section. Owyhee County v. Rife, 100 Idaho 91, 593 P.2d 995 (1979).

Cited in: Hill v. Empire State-Idaho Mining & Developing Co., 158 F. 881 (C.C.D. Idaho 1908); Hill v. Standard Mining Co., 12 Idaho 223, 85 P. 907 (1906); Nelson v. Steele, 12 Idaho 762, 88 P. 95 (1906); Hailey v. Riley, 14 Idaho 481, 95 P. 686 (1908); Bashor v. Beloit, 20 Idaho 592, 119 P. 55 (1911); Rogers v. Rogers, 42 Idaho 158, 243 P. 655 (1926); Gonzaga Univ. v. Masini, 42 Idaho 660, 249 P. 93 (1926); State ex rel. Gallet v. Naylor, 50 Idaho 113, 294 P. 333 (1930); Common School Dist. No. 18 v. Twin Falls State Bank & Trust Co., 52 Idaho 200, 12 P.2d 774 (1932); Trimming v. Howard, 52 Idaho 412, 16 P.2d 661 (1932); State Ins. Fund v. Hunt, 52 Idaho 639, 17 P.2d 354 (1932); Doolittle v. Eckert, 53 Idaho 384, 24 P.2d 36 (1933); Ramseyer v. Ramseyer, 98 Idaho 47, 558 P.2d 76 (1976); Myers v. City of Pocatello, 98 Idaho 168, 559 P.2d 1136 (1977); Owyhee County v. Rife, 100 Idaho 91, 593 P.2d 995 (1979); Spanbauer v. J.R. Simplot Co., 107 Idaho 42, 685 P.2d 271 (1984); Heileson v. Cook, 108 Idaho 236, 697 P.2d 1250 (Ct. App. 1985); Anderson v. Anderson, Kaufman, Ringert & Clark, Chartered, 116 Idaho 359, 775 P.2d 1201 (1989); Housley v. State, 119 Idaho 885, 811 P.2d 495 (Ct. App. 1991); Bankers Life & Cas. Co. v. Gilmore, 141 Bankr. 734 (Bankr. D. Idaho 1992); Magic Valley Radiation v. Kolouch, 123 Idaho 434, 849 P.2d 107 (1993); MacLeod v. Reed, 126 Idaho 669, 889 P.2d 103 (Ct. App. 1995); McCuskey v. Canyon County Comm'rs, 128 Idaho 213, 912 P.2d 100 (1996); Eagle Water Co. v. Roundy Pole Fence Co., 134 Idaho 626,

7 P.3d 1103 (2000); D.A.R., Inc. v. Sheffer, 134 Idaho 141, 997 P.2d 602 (2000).

RESEARCH REFERENCES

A.L.R. — What statute of limitations governs action by contract contractee for defective or improper performance of work by private building contractor. 1 A.L.R.3d 914.

When statute of limitations begins run against action to recover money paid by mistake. 79 A.L.R.3d 754.

5-225. Limitations apply to state. — The limitations prescribed in this chapter apply to actions brought in the name of the state, or for the benefit of the state, in the same manner as to actions by private parties.

History.
C.C.P. 1881, § 165; R.S., R.C., & C.L., § 4061; C.S., § 6618; I.C.A., § 5-225.

STATUTORY NOTES

Cross References.
Action on written contracts, limitation not applicable to state, § 5-216.

JUDICIAL DECISIONS

Analysis

Application in general.
Counties.
Public school endowment funds.
State.
Transfer of tax against property.
Unemployment benefits.

Application in General.

This section is specifically restricted to the limitations "prescribed in this chapter," that is, of actions of a private nature and against private individuals; it does not apply to an action to enforce a public duty, such as an action on behalf of a county to compel the commissioners of another county to appoint an accountant for the apportionment of the indebtedness of the counties as prescribed by a county division act. Elmore County v. Alturas County, 4 Idaho 145, 37 P. 349 (1894).

Where one holds a claim against the state, and does not make application to the supreme court for a recommendatory decision, under the provisions of Idaho Const., art. 5, § 10, for 9 or 10 years after the claim becomes due, the supreme court is not authorized to hear the claim and recommend the payment thereof to the legislature and said claim is barred by the statute of limitations. Small v. State, 10 Idaho 1, 76 P. 765 (1904).

This section is intended to provide a limitation for every kind of action that may be brought in courts of state. Blaine County v. Butte County, 45 Idaho 193, 261 P. 338 (1927).

Counties.

The statute runs against the county in a civil action brought by it against the clerk, auditor and recorder for illegal fees and compensation collected by him from the county during his term of office. Bannock County v. Bell, 8 Idaho 1, 65 P. 710 (1901).

This section is applicable to counties of state. Blaine County v. Butte County, 45 Idaho 193, 261 P. 338 (1927).

Limitation prescribed by § 5-218 applies to actions brought by counties. Lemhi County ex rel. Gilbreath v. Boise Livestock Loan Co., 47 Idaho 712, 278 P. 214 (1929).

Public School Endowment Funds.

Statute of limitations cannot run against the state so as to bar a suit to foreclose a mortgage securing public school endowment funds as the funds are trust funds of the highest order protected by state and federal laws and constitutional provisions. United States v. Nashville, C. & S.L. Ry., 118 U.S. 120, 6 S. Ct. 1006, 30 L. Ed. 81 (1886); State v.

Peterson, 61 Idaho 50, 97 P.2d 603 (1939).

State.

The statute of limitations applies to the state as well as to private individuals. Small v. State, 10 Idaho 1, 76 P. 765 (1904); State ex rel. Gallet v. Naylor, 50 Idaho 113, 294 P. 333 (1930).

The state in bringing suit may not avoid the statute of limitations imposed by § 5-224 and this section, absent a showing that the application of a statute of limitations to the state would result in an unconstitutional outcome or absent a statute immunizing the state from the statute of limitations. Aetna Cas. & Sur. Co. v. Gulf Resources & Chem. Corp., 600 F. Supp. 797 (D. Idaho 1985).

Transfer of Tax against Property.

The state's cross-complaint, to enforce transfer of tax against property, filed in a quiet title action more than thirteen (13) years after the death of the deceased, was barred by limitations under a statute then existing, since the statute limiting the time of the collecting of transfer of tax commenced to run on the death of the deceased. Hagan v. Young, 64 Idaho 318, 132 P.2d 140 (1927).

Unemployment Benefits.

The three-year period of limitations prescribed in § 5-218 is applicable to an action brought by or for the benefit of the state to recover unemployment benefits fraudulently obtained. Norton v. Department of Emp., 94 Idaho 924, 500 P.2d 825 (1972).

Cited in: State ex rel. Cromwell v. Panzeri, 76 Idaho 211, 280 P.2d 1064 (1955); White v. Conference Claimants Endowment Comm'n, 81 Idaho 17, 336 P.2d 674 (1959).

RESEARCH REFERENCES

Am. Jur. — 51 Am. Jur. 2d, Limitation of Actions, §§ 74, 85.

C.J.S. — 54 C.J.S., Limitations of Actions, § 100 et seq.

81A C.J.S., States, § 568.

5-226. Action to redeem mortgage. — An action to redeem a mortgage of real property, with or without an account of rents and profits, may be brought by the mortgagor or those claiming under him, against the mortgagee in possession, or those claiming under him, unless he or they have continuously maintained an adverse possession of the mortgaged premises for five (5) years after breach of some condition of the mortgage.

History.

C.C.P. 1881, § 166; R.S., R.C., & C.L., § 4062; C.S., § 6619; I.C.A., § 5-226.

JUDICIAL DECISIONS

Application in General.

Statutes of limitations apply both to equity and law cases and to the most meritorious claims. Steinour v. Oakley State Bank, 49 Idaho 293, 287 P. 949 (1930).

Cited in: Fountain v. Lewiston Nat'l Bank, 11 Idaho 451, 83 P. 505 (1905).

RESEARCH REFERENCES

Am. Jur. — 3 Am. Jur. 2d, Adverse Possession, §§ 184, 238 to 241.

55 Am. Jur. 2d, Mortgages, § 1132 et seq.

C.J.S. — 59A C.J.S., Mortgages, § 1419 et seq.

5-227. Partial redemption. — If there is more than one such mortgagor, or more than one person claiming under a mortgagor, some of whom are not entitled to maintain such an action under the provisions of this title, any one of them who is entitled to maintain such an action may redeem

therein a divided or undivided part of the mortgaged premises, according as his interest may appear, and have an accounting for a part of the rents and profits proportionate to his interest in the mortgaged premises, on payment of a part of the mortgage money, bearing the same proportion to the whole of such money as the value of his divided or undivided interest in the premises bears to the whole of such premises.

History.
C.C.P. 1881, § 167; R.S., R.C., & C.L., § 4063; C.S., § 6620; I.C.A., § 5-227.

STATUTORY NOTES

Compiler's Notes.
The words "this title" were used in the Compiled Statutes and, as there used, include chapter 2 of this title.

RESEARCH REFERENCES

Am. Jur. — 3 Am. Jur. 2d, Adverse Possession, §§ 188 to 191.
C.J.S. — 59A C.J.S., Mortgages, § 1460 et seq.
A.L.R. — Right of junior mortgagee whose mortgage covers only a part of land subject to first mortgage to redeem pro tanto, where he was not bound by foreclosure sale. 46 A.L.R.3d 1362.

5-228. Action, when commenced. — An action is commenced within the meaning of the chapter when the complaint is filed.

History.
C.C.P. 1881, § 168; R.S., R.C., & C.L., § 4068; C.S., § 6621; I.C.A., § 5-228.

STATUTORY NOTES

Cross References.
Pleading statute of limitations, Idaho Civil Procedure Rule 9(h).

JUDICIAL DECISIONS

Analysis

Injunction.
Parties brought in after limit.

Injunction.
Order granting a writ of injunction does not take effect until the filing of the complaint and the required undertaking. Elmore County Irrigation Farms Ass'n v. Stockslager, 22 Idaho 420, 126 P. 616 (1912).

Parties Brought in After Limit.
Statute ceases to run upon filing an original complaint even as to parties later brought into suit after the time limited in the statute. Idaho Trust & Sav. Bank v. Nampa & Meridian Irrigation Dist., 29 Idaho 658, 161 P. 872 (1916).

Taxes and penalties under Unemployment Compensation Law (see § 73-1301 et seq.) constitute a "statutory liability" within a three-year limitation, such "statutory liability" being one that depends for its existence on enactment of a statute rather than contract of parties. State v. Ada County Dairymen's Ass'n, 66 Idaho 317, 159 P.2d 219 (1945).

RESEARCH REFERENCES

Am. Jur. — 51 Am. Jur. 2d, Limitation of Actions, § 243 et seq.
61A Am. Jur. 2d, Pleading, § 221 et seq.

C.J.S. — 54 C.J.S., Limitations of Actions, § 265 et seq.
1A C.J.S., Actions, § 295 et seq.

5-228A. Time limitation — Closure of the office of the clerk — Extension of time. — Whenever, pursuant to an Idaho statute, the final day to commence an action or file a document with a court falls on a day that the office of the clerk of the district court is usually open for the transaction of business with the public, but whose office has been closed for all or part of the day by the administrative judge or his designee due to severe weather conditions or a real or threatened emergency, the time for performing the act shall be extended to the end of business hours of the first full day the office of the clerk is reopened for the transaction of business with the public.

History.
I.C., § 5-228A, as added by 2004, ch. 321, § 1, p. 904.

5-229. Absence of defendant from state. — If, when the cause of action accrues against a person, he is out of the state, the action may be commenced within the term herein limited, after his return to the state, and if, after the cause of action accrues, he departs from the state, the time of his absence is not part of the time limited for the commencement of the action.

History.
C.C.P. 1881, § 169; R.S., R.C., & C.L., § 4069; C.S., § 6622; I.C.A., § 5-229.

JUDICIAL DECISIONS

ANALYSIS

Absence of Debtor from State.

Absence of debtor from state tolls statute for period of such absence. Simonton v. Simonton, 33 Idaho 255, 193 P. 386 (1920).

Since the decision in *Lipe v. Javelin Tire Co.*, 96 Idaho 723, 536 P.2d 291 (1975) (see notes following heading "Foreign Corporation") did not apply retroactively, the statute of limitations on an action on a promissory note was tolled when the defendants left the state in 1968 regardless of whether the defendants had been susceptible to service of process under the "long-arm" statute. Jones v. Watson, 98 Idaho 606, 570 P.2d 284 (1977).

Absence of Father from State.

A father was not absent from the state within the meaning of this section, where the mother at all times knew the father's address and telephone number in Canada, the father was subject to the jurisdiction of the Idaho

courts by virtue of a long arm statute, and the mother had been able to serve process on the father in the instant case. Stonecipher v. Stonecipher, 131 Idaho 731, 963 P.2d 1168 (1998).

Absence of Husband from State.

Absence of husband from the state tolled statute of limitations as to support order in divorce decree. Despain v. Despain, 78 Idaho 185, 300 P.2d 500 (1956).

Aggregating Successive Absences.

Where departure from state, after accrual of cause of action, is within exception providing that such absences shall not be computed, every absence sufficient to suspend running of limitations must be counted and successive absences will be aggregated. Roberts v. Hudson, 49 Idaho 132, 286 P. 364 (1930).

Construction with Other Law.

Sections 5-514 and 49-2421 do not impliedly repeal this section. Tetzlaff v. Brooks, 130 Idaho 903, 950 P.2d 1242 (1997).

Foreign Corporation.

Trial court erred in granting summary judgment to foreign defendant on grounds that the statute of limitations had run and had not been tolled under this section, since plaintiff should have been given the opportunity to show that reasonably diligent efforts had been made to serve the defendant without success, so that the statute of limitations had been tolled. Lipe v. Javelin Tire Co., 96 Idaho 723, 536 P.2d 291 (1975).

Where plaintiff had known out-of-state address of foreign corporation defendant who had withdrawn from doing business in Idaho from shortly after injury and had known enough to mail his claim letter to that address and defendant foreign corporation had been in business at that address since 1968 and plaintiff had in his possession business forms with the address, action filed some two years and eleven days after the injury was barred by the statute of limitations. Lipe v. Javelin Tire Co., 97 Idaho 805, 554 P.2d 1302 (1976).

Grantor of Mortgaged Property.

One who sells or reincumbers mortgaged premises can not by absenting himself from the state continue in force, beyond what would otherwise be period of limitations, lien of first mortgage to detriment of his subsequent grantee or mortgagee. Dighton v. First Exch. Nat'l Bank, 33 Idaho 273, 192 P. 832 (1920).

Grantee of mortgagor, although not obligated to pay debt, who has acquired interest in premises before right to foreclosure is barred, can not plead statute of limitations in foreclosure suit if debtor has suspended period with respect to debt by his continued absence from state. Dighton v. First Exch. Nat'l Bank, 33 Idaho 273, 192 P. 832 (1920).

Whatever prevents running of statute of limitations as to debt will also prevent its running as to lien of mortgage. Dighton v. First Exch. Nat'l Bank, 33 Idaho 273, 192 P. 832 (1920).

Long-arm Statute.

Where jurisdiction of a defendant may be had under the "long arm statute" (§ 5-514), the defendant is not absent from the state within the meaning of this statute. Blankenship v. Myers, 97 Idaho 356, 544 P.2d 314 (1975).

Nature of Absence.

It is immaterial what may be the cause of absence or whether it be of a mere temporary nature or a change of residence and domicile. Anthes v. Anthes, 21 Idaho 305, 121 P. 553 (1912).

Nonresident Debtors.

The words "return to the state" apply to a nonresident debtor who enters into a contract in a foreign state and thereafter comes into this state, as well as to a citizen who enters into a contract within this state and thereafter departs from the state. West v. Theis, 15 Idaho 167, 96 P. 932 (1908).

Pleading and Proof.

Allegation that defendant departed from state and has ever since been "a resident of and domiciled in California" can not be said to be an ambiguous or unintelligible allegation of his being "out of or absent from the state." MacLeod v. Stelle, 43 Idaho 64, 249 P. 254 (1926).

Reasonably Diligent Efforts.

Summary judgment was properly granted based on the running of the statute of limitations under § 5-216 in a claim for payment on a note, where, although the defendant left the state and never returned, the plaintiffs made only two attempts by letter to contact the defendant more than five years apart; this did not constitute "reasonably diligent efforts" so as to toll the statute of limitations under this rule. Butterfield v. MacKenzie, 132 Idaho 62, 966 P.2d 658 (Ct. App. 1998).

Tolling.

This section tolls the running of a statute of limitations only when the party against whom the claim is made was out of state and during that time could not have been located for service of process with reasonably diligent efforts. Tetzlaff v. Brooks, 130 Idaho 903, 950 P.2d 1242 (1997).

Defendant's failure to file a certificate of assumed business name did not implicate the statute of limitation tolling provisions of this section, where the uncontroverted evidence established that at all relevant times defen-

dant had on file with the secretary of state a designation of registered agent authorized to receive service of process. Noreen v. Price Dev. Co., 135 Idaho 816, 25 P.3d 129 (Ct. App. 2001).

Cited in: Brackney v. Combustion Eng'g, Inc., 674 F.2d 812 (9th Cir. 1982); Landis v. Hodgson, 109 Idaho 252, 706 P.2d 1363 (Ct. App. 1985); Bankers Life & Cas. Co. v. Gilmore, 141 Bankr. 734 (Bankr. D. Idaho 1992).

RESEARCH REFERENCES

Am. Jur. — 51 Am. Jur. 2d, Limitation of Actions, § 190 et seq.

C.J.S. — 54 C.J.S., Limitations of Actions, § 128 et seq.

5-230. Persons under disabilities — Other than for real property. — If a person entitled to bring an action, other than for the recovery of real property, be, at the time the cause of action accrued, either:

1. Under the age of majority; or
2. Insane.[;]

The time of such disability is not a part of the time limited for the commencement of the action, provided however, that the time limited for the commencement of an action shall not be tolled for a period of more than six (6) years on account of minority, incompetency, a defendant's absence from the jurisdiction, any legal disability or for other cause or reason except as specifically provided in section 5-213, Idaho Code.

History.

C.C.P. 1881, § 170; R.S., R.C., & C.L., § 4070; C.S., § 6623; I.C.A., § 5-230; am. 1976, ch. 276, § 1, p. 950; am. 1985, ch. 74, § 1, p. 149; am. 1993, ch. 120, § 1, p. 308.

STATUTORY NOTES

Cross References.

Action for recovery of real property or possession thereof, disability of persons, § 5-213.

Coexisting disabilities, effect, § 5-236.

Disability must exist when right of action accrued, § 5-235.

Compiler's Notes.

The bracketed semicolon at the end of clause 2. was inserted by the compiler.

Section 2 of S.L. 1976, ch. 276, read: "This act shall apply retroactively as respects all claims heretofore accrued and also to acts, errors or omissions heretofore or hereafter occurring."

Effective Dates.

Section 3 of S.L. 1976, ch. 276 provided that the act should take effect on and after September 1, 1976.

JUDICIAL DECISIONS

ANALYSIS

Application.
Imprisonment.
Married woman.
Minors.
Purpose.

Application.

When two statutes are capable of coexistence, it is the duty of the courts to harmonize and reconcile them so as to deprive neither of potency and force; thus, § 5-236 which declares that the statute of limitations remains tolled where a person is both a minor and incompetent has to be read in conjunction with this section which specifically limits the tolling period for both minority and incompetency to six years. Brackney v. Combustion Eng'g, Inc., 674 F.2d 812 (9th Cir. 1982).

The 1976 amendment to this section enacted on March 31, 1976, which provided that

subsequent to September 1, 1976, no action would be tolled for a period of more than six years, was expressly made retroactive by the Idaho legislature so as to destroy any stale cause of action which had been lying idle for more than six years; thus, a minor's cause of action filed in 1979 for a wrongful death which occurred in 1961 was properly dismissed as barred by the statute of limitations, since the minor had sat on his remedy for more than 15 years under the old minority tolling provision and since he had failed to file suit during the five month period after the law was changed and before the new law became effective. Brackney v. Combustion Eng'g, Inc., 674 F.2d 812 (9th Cir. 1982).

Imprisonment.

Where the plaintiff was arrested in July, 1974 on a criminal complaint of embezzlement and imprisoned for one day before being released on his own recognizance, and following his conviction was again imprisoned, his cause of action under the federal civil rights statute, 42 U.S.C.S. § 1983, arose at the time of his first imprisonment and the three-year statute of limitations under § 5-218 was not tolled under this section by his subsequent imprisonment; accordingly, the filing of his civil rights action in August, 1977 was not timely and the action was barred. Gowin v. Altmiller, 663 F.2d 820 (9th Cir. 1981). But see Idaho State Bar v. Tway, 128 Idaho 794, 919 P.2d 323 (1996).

Married Woman.

Under Idaho law, a married woman is empowered, without joining her husband, to bring an action for damages for her own personal injury; hence the provision governing the disability of a married woman did not toll the running of the statute as to a married woman's action for medical malpractice until the termination of her marriage. Owens v. White, 380 F.2d 310 (9th Cir. 1967) (Decision prior to 1976 amendment).

Minors.

This section, the general tolling provision, applies to all procedures integral to commencing actions against private or public defendants, including the notice procedure of § 6-906. Consequently, subdivision 1 of this section tolled the running of the time within which § 6-906 required the minor plaintiffs to give notice to the school district, and the notice given on their behalf was adequate as a matter of law. Doe v. Durtschi, 110 Idaho 466, 716 P.2d 1238 (1986) (decision prior to enactment of § 6-906A).

This section, providing for tolling of statutes of limitation against minors, serves to toll the time for filing a notice of claim under the Idaho Tort Claims Act, § 6-906. Gailey v. Jerome County, 113 Idaho 430, 745 P.2d 1051 (1987).

Although the department of health and welfare was not literally a "person" under disability of minority, it was entitled to have the limitation period tolled by this section. State Dep't of Health & Welfare ex rel. Gage v. Engelbert, 114 Idaho 89, 753 P.2d 825 (1988).

Purpose.

The obvious intent of subdivision 1 of this section is to preserve the rights of injured minors until they are old enough to take appropriate action. Doe v. Durtschi, 110 Idaho 466, 716 P.2d 1238 (1986).

Cited in: Independent Sch. Dist. v. Callister, 97 Idaho 59, 539 P.2d 987 (1975); Gowin v. Altmiller, 455 F. Supp. 743 (D. Idaho 1978); Henderson v. Smith, 128 Idaho 444, 915 P.2d 6 (1996).

RESEARCH REFERENCES

Am. Jur. — 51 Am. Jur. 2d, Limitation of Actions, §§ 216, 221 to 235, 241, 242.

C.J.S. — 54 C.J.S., Limitations of Actions, § 135 et seq.

A.L.R. — Minority of surviving children as tolling limitation period in state wrongful death action. 85 A.L.R.3d 162.

Effect of appointment of legal representative for minor on running of state statute of limitations against minor. 1 A.L.R.6th 407.

5-231. Death of party. [Repealed.]

STATUTORY NOTES

Compiler's Notes.

This section, which comprised C.C.P. 1881, § 171; R.S., R.C., & C.L., § 4071; C.S., § 6624; I.C.A., § 5-231, was repealed by S.L. 1971, ch. 111, § 2, effective July 1, 1972.

5-232. Aliens in time of war. — When a person is an alien subject, or citizen of a country at war with the United States, the time of the

continuance of the war is not part of the period limited for the commencement of the action.

History.
C.C.P. 1881, § 172; R.S., R.C., & C.L., § 4072; C.S., § 6625; I.C.A., § 5-232.

RESEARCH REFERENCES

Am. Jur. — 51 Am. Jur. 2d, Limitation of Actions, § 213.

Collateral References. — 54 C.J.S, Limitations of Actions, § 259.

5-233. Reversal of judgment — New action. — If an action is commenced within the time prescribed therefor and a judgment therein for the plaintiff be reversed on appeal, the plaintiff, or if he die and the cause of action survive, his representatives, may commence a new action within one (1) year after the reversal.

History.
C.C.P. 1881, § 173; R.S., R.C., & C.L., § 4073; C.S., § 6626; I.C.A., § 5-233.

JUDICIAL DECISIONS

"Judgment".
Trial court's finding of balance in plaintiff's favor under accounting directed by supreme court to be taken pending appeal was not "judgment" for plaintiffs within provision permitting new action within one year after reversal. Steinour v. Oakley State Bank, 49 Idaho 293, 287 P. 949 (1930).

RESEARCH REFERENCES

Am. Jur. — 51 Am. Jur. 2d, Limitation of Actions, §§ 273 to 274, 277, 279 to 285, 287, 289, 290, 292, 293, 296, 298 to 300.

C.J.S. — 54 C.J.S., Limitations of Actions, § 292 et seq.

5-234. Action stayed by injunction or statute. — When the commencement of an action is stayed by injunction or statutory prohibition the time of the continuance of the injunction or prohibition is not part of the time limited for the commencement of the action.

History.
C.C.P. 1881, § 174; R.S., R.C., & C.L., § 4074; C.S., § 6627; I.C.A., § 5-234.

JUDICIAL DECISIONS

ANALYSIS

Federal injunction.
Non-binding arbitration.

Federal Injunction.
Where prosecution of action was barred by federal injunction in reorganization proceedings, another action brought in conformity with federal proceedings was not barred. Doxstater v. Northwest Cities Gas Co., 65 Idaho 814, 154 P.2d 498 (1944).

Non-Binding Arbitration.
Order denying the attorney's motion to dismiss the client's breach of contract action was reversed because the district court erred in

holding that the statute of limitations was tolled by the pendency of the nonbinding fee arbitration proceedings, when there was no injunction or statute that stayed the client's action against the attorney or that barred him from commencing the action until the nonbinding arbitration was completed. Wilhelm v. Frampton, 144 Idaho 147, 158 P.3d 310 (2007).

Cited in: Duff v. Draper, 96 Idaho 299, 527 P.2d 1257 (1974).

RESEARCH REFERENCES

Am. Jur. — 51 Am. Jur. 2d, Limitation of Actions, §§ 207, 208.

C.J.S. — 54 C.J.S., Limitations of Actions, §§ 156, 157.

5-235. When disability must exist. — No person can avail himself of a disability unless it existed when his right of action accrued.

History.
C.C.P. 1881, § 175; R.S., R.C., & C.L., § 4075; C.S., § 6628; I.C.A., § 5-235.

STATUTORY NOTES

Cross References.
Disabilities tolling statute of limitations, §§ 5-213, 5-230.

RESEARCH REFERENCES

Am. Jur. — 51 Am. Jur. 2d, Limitation of Actions, §§ 220, 232.

Collateral References. — 54 C.J.S, Limitations of Actions, § 105.

5-236. Coexisting disabilities. — When two (2) or more disabilities coexist at the time the right of action accrues the limitation does not attach until they are removed.

History.
C.C.P. 1881, § 176; R.S., R.C., & C.L., § 4076; C.S., § 6629; I.C.A., § 5-236.

STATUTORY NOTES

Cross References.
Disabilities tolling statute of limitations, §§ 5-213, 5-230.

JUDICIAL DECISIONS

ANALYSIS

Application.
Construction with other statutes.

Application.
The function of this section is to determine the date of accrual of civil causes of action for purposes of the statute of limitation; this section does not pertain to criminal prosecutions. State v. Harrold, 113 Idaho 938, 750 P.2d 959 (Ct. App. 1988).

Construction with Other Statutes.
When two statutes are capable of coexistence, it is the duty of the courts to harmonize and reconcile them so as to deprive neither of potency and force; thus, this section which declares that the statute of limitations remains tolled where a person is both a minor

and incompetent has to be read in conjunction with § 5-230 which specifically limits the tolling period for both minority and incompetency to six years. Brackney v. Combustion Eng'g, Inc., 674 F.2d 812 (9th Cir. 1982).

RESEARCH REFERENCES

Am. Jur. — 51 Am. Jur. 2d, Limitation of Actions, § 222.

C.J.S. — 54 C.J.S., Limitations of Actions, § 139.

5-237. Actions against directors and stockholders. — This chapter does not affect actions against directors or stockholders of a corporation to recover a penalty or forfeiture imposed, or to enforce a liability created by law; but such actions must be brought within three (3) years after the discovery by the aggrieved party of the facts upon which the penalty or forfeiture attached, or the liability was created.

History.
C.C.P. 1881, § 177; R.S., R.C., & C.L., § 4077; C.S., § 6630; I.C.A., § 5-237.

JUDICIAL DECISIONS

ANALYSIS

Creditor as aggrieved person.
Liability created by law.
Stockholder's assessment.
Wrongful distribution of assets.

Creditor as Aggrieved Person.

When the purpose of a receiver's action against a stockholder is to recover sufficient assets to pay a certain judgment, the judgment creditor is the "aggrieved party." Weil v. Defenbach, 36 Idaho 37, 208 P. 1025 (1922).

Liability Created by Law.

The liability of a stockholder for corporate indebtedness to the amount unpaid upon the par value of his stock is not a "liability created by law" within the meaning of this section. Feehan v. Kendrick, 32 Idaho 220, 179 P. 507 (1918); Jensen v. Aikman, 32 Idaho 261, 181 P. 525 (1919).

Counterclaim by corporation against officer and director for loss of profits due to breach of fiduciary relationship between plaintiff and defendant was not a suit for liability "created by law." Melgard v. Moscow Idaho Seed Co., 73 Idaho 265, 251 P.2d 546 (1952).

Stockholder's Assessment.

Complaint sufficiently set out in detail the indebtedness being sued upon. Grimsmoe v. Kendrick, 42 Idaho 491, 247 P. 746 (1926).

Stockholder's liability for assessment levied by insurance exchange is statutory and is governed by this section and § 5-218. Fishback v. Jensen, 52 Idaho 61, 11 P.2d 361 (1932).

Wrongful Distribution of Assets.

Receiver's action against directors to recover dividends wrongfully paid held not barred simply because creditors might have discovered when the dividends were paid if they had made certain investigations. Stoltz v. Scott, 23 Idaho 104, 129 P. 340 (1912).

This section applies to an action against a stockholder to recover assets wrongfully distributed to him. Weil v. Defenbach, 36 Idaho 37, 208 P. 1025 (1922).

Cited in: Billings v. Sisters of Mercy, 86 Idaho 485, 389 P.2d 224 (1964); Anderson v. Anderson, Kaufman, Ringert & Clark, Chartered, 116 Idaho 359, 775 P.2d 1201 (1989).

RESEARCH REFERENCES

Am. Jur. — 18A Am. Jur. 2d, Corporations, § 761.

18B Am. Jur. 2d, Corporations, §§ 1156, 1157, 1580, 1581, 1626.

19 Am. Jur. 2d, Corporations, § 1995 et seq.

C.J.S. — 19 C.J.S., Corporations, § 899 et seq.

5-238. Acknowledgment or new promise — Effect on operation of statute — Effect of partial payment. — No acknowledgment or promise is sufficient evidence of a new or continuing contract by which to take the case out of the operation of this chapter, unless the same is contained in some writing, signed by the party to be charged thereby; but any payment of principal or interest is equivalent to a new promise in writing, duly signed, to pay the residue of the debt.

History.
C.C.P. 1881, § 178; R.S., R.C., & C.L., § 4078; C.S., § 6631; am. 1923, ch. 49, § 1, p. 57; I.C.A., § 5-238.

JUDICIAL DECISIONS

ANALYSIS

Acknowledgment Before Debt Barred.

The acknowledgment and promise to pay a debt which would otherwise be barred by limitations must be in writing signed by the party sought to be charged as well where the original debt is not barred when the acknowledgment and promise is made, as in cases where the statute has already run. Reed v. Smith, 1 Idaho 533 (1874).

Clear and definite acknowledgment of the existence of a contract and liability which has not at the time been barred by the statute of limitations, whether coupled with a direct promise to pay or not, carries with it an implied promise to pay the debt and fixes a new date from which the statute begins to run. Dern v. Olsen, 18 Idaho 358, 110 P. 164 (1910).

Conduct as a shareholder of a subscriber to corporate stock which did not include execution of a writing or payment of a portion of the principal or interest on the subscription did not acknowledge the obligation so as to take an action to recover the subscription out of the statute of limitations as to an instalment barred at the time of commencement of the action. Cassia Creek Reservoir Co. v. Harper, 91 Idaho 488, 426 P.2d 209 (1967).

Amendment of 1923.

The amendment of 1923 applies to all actions brought after its enactment although the payment may have been made before. Vollmer Clearwater Co. v. Hines, 49 Idaho 563, 290 P. 397 (1930).

Applicable to Judgments.

Provision requiring written acknowledgment of promise to pay debt barred by limitation signed by debtor was applicable to judgment. Woods v. Locke, 49 Idaho 486, 289 P. 610 (1930).

Debt as "Continuing Contract."

Debt which has not been barred by the statute of limitations is a "continuing contract" within the meaning of this section which does not, in any respect, change, alter, or modify the original contract, but merely constitutes a "waiver" of that portion of this section which may have run prior to the acknowledgment. Cummings v. Langroise, 36 F. Supp. 174 (D. Idaho 1940), aff'd 123 F.2d 969 (9th Cir. 1941), cert. denied, 316 U.S. 664, 62 S. Ct. 944, 86 L. Ed. 1741 (1942).

Effect Upon Limitation Period.

Where an ex-husband failed to make payments on a promissory note, the statute of limitations did not bar the ex-wife's breach of contract claim, because the ex-husband's payment of interest or principal served to restart the statute on all of the installments. Horkley

v. Horkley, 144 Idaho 879, 173 P.3d 1138 (2007).

Judgment Lien Not Extended.

Though partial payment or extension may extend the maturity date and toll the statute of limitations as against a judgment, it will not extend or continue the judgment lien unless made in writing so as to be entitled to recordation. Platts v. Pacific First Fed. Sav. & Loan Ass'n, 62 Idaho 340, 111 P.2d 1093 (1941).

New Agreement or Revival of Old.

Method of determining whether agreement after limitations had run was acknowledgment of a continued Carey Act water contract, or whether new obligation was created, is to inquire whether, in action to enforce obligation, new contract or old one as extended would be pleaded as foundation of plaintiff's claim. Mendini v. Milner, 47 Idaho 439, 276 P. 313 (1929).

Partial Payment of Debt.

The limitation period can be extended by an obligor who makes a partial payment after the note is due, as such partial payment is deemed equivalent to a new promise by the obligor to satisfy the debt. Thomson v. Sunny Ridge Village Partnership, 118 Idaho 330, 796 P.2d 539 (Ct. App. 1990).

Because this section treats a payment of interest as the equivalent of a new promise, and because a promise binds only the person making it, so too a partial payment should extend a statutory period of limitation only as to the person who makes the payment, although, certain exceptions include when a nonpaying co-debtor directs or requests that the payment be made, authorizes or consents to the payment, or ratifies such payment. Thomson v. Sunny Ridge Village Partnership, 118 Idaho 330, 796 P.2d 539 (Ct. App. 1990).

Payment.

Payments made by a third party to a creditor on behalf of, and at the express request of, the debtor tolls the statute of limitations and creates a new promise to pay the residue of the debt. Joseph v. Darrar, 93 Idaho 762, 472 P.2d 328 (1970).

Collection of the merchandise account balance was not time-barred under this section because of payments on the account; a payment on account removes the debt from the operation of the statute of limitations pursuant to this section. Modern Mills, Inc. v. Havens, 112 Idaho 1101, 739 P.2d 400 (Ct. App. 1987).

Evidence adequately supported the court's conclusion that the promise to pay had been renewed by an interest payment, where the trial judge was persuaded that alterations on the face of the exhibits were made in response to the promisor's directions; therefore, the action on the note was not barred by the five-year limitation period prescribed by § 5-216. Modern Mills, Inc. v. Havens, 112 Idaho 1101, 739 P.2d 400 (Ct. App. 1987).

Renewal Note Not Usurious.

Where the statute of limitations had not run against a debt evidenced by a note bearing the legal rate of 10 per cent interest when a new note, also bearing 10 per cent interest, was given after the maximum rate allowable by law had been changed to 8 per cent, and the statute had not run against the new note when an action was commenced thereon and no additional consideration passed when the new note was executed, the only change made being the naming of a new maturity date, the new note was simply a "renewal note" and was not usurious. Dufrense v. Hammersten, 61 Idaho 714, 106 P.2d 861 (1940).

Separate Contracts.

Under the law as it existed at the time the mortgages in question were made, each note, and the mortgage given to secure the payment of the same, was to be construed as one contract. Steward v. Nelson, 54 Idaho 437, 32 P.2d 843 (1934).

Settlement of Claim.

Settlement between farmer and manufacturer of herbicide did not toll the limitation period on the farmer's product liability claim. The debt acknowledged and paid was for a particular year and for a particular acreage, and not a debt for any and all future uses; therefore, the settlement did not amount to payment of "principle or interest . . . equivalent to a new promise . . . to pay the residue of the debt." Brower v. E.I. DuPont De Nemours & Co., 117 Idaho 780, 792 P.2d 345 (1990).

Suit Upon Original Demand or New Promise.

The authorities are divided as to whether the suit should be upon the original demand or obligation or the new promise; however, Idaho is committed to the doctrine that the running of the statute of limitations does not extinguish the debt and that the action should be upon the original obligation, and that the bar of the statute of limitations merely operates on the remedy and does not extinguish the debt. Kelly v. Leachman, 3 Idaho 629, 33 P. 44 (1893); Moulton v. Williams, 6 Idaho 424, 55 P. 1019 (1899); Sterrett v. Sweeney, 15 Idaho 416, 98 P. 418 (1908); McLeod v. Rogers, 28 Idaho 412, 154 P. 970 (1916).

What Constitutes Acknowledgment.

The giving of new notes, including the interest due on the original debt, is sufficient acknowledgment of the whole indebtedness to prevent the running of the statute of limita-

tions. Kelly v. Leachman, 3 Idaho 629, 33 P. 44 (1893).

An indorsement written on a note and mortgage by which the debtor purports to acknowledge and renew the same is evidence of waiver by the debtor of the bar of the statute. Moulton v. Williams, 6 Idaho 424, 55 P. 1019 (1899).

Payment on a promissory note to remove the bar of the statute of limitations must be evidenced by a writing, must be a voluntary payment by the payee, and must be made for the purpose of applying the payment on the note. Gray v. Pierson, 7 Idaho 540, 64 P. 233 (1901) (decision prior to 1923 amendment.).

Payment of interest on mortgage debt is such an acknowledgment as tolls the statute against foreclosure. Holland Bank v. Brockman, 52 Idaho 324, 14 P.2d 621 (1932); Brown v. Deck, 65 Idaho 710, 152 P.2d 587 (1944).

A written approval by the debtor of a report of the lender showing advances and loans made up to that time and showing that none of the advances or loans had been repaid constituted an acknowledgment that the loans had not been repaid and that the debt continued to exist so that the statute of limitations began to run anew on the date of such acknowledgment. Cummings v. Langroise, 36 F. Supp. 174 (D. Idaho 1940), aff'd 123 F.2d 969 (9th Cir. 1941), cert. denied, 316 U.S. 664, 62 S. Ct. 944, 86 L. Ed. 1741 (1942).

Husband and his wife attempted to recover loans made to decedent's farming operation, which was a partnership; however, the statute of limitations barred recovery, despite the husband's and wife's contention that the parties had entered into a stipulation, which was not an acknowledgment of the loans. Reding v. Reding, 141 Idaho 369, 109 P.3d 1111 (2005).

Who May Make Acknowledgment.

An administrator can not "acknowledge or promise" to pay "a new or continuing contract" so as to remove the same from the operation of the statute of limitations. Dern v. Olsen, 18 Idaho 358, 110 P. 164 (1910).

Payment of interest and postponement of payment on community property mortgage by husband constitutes sufficient acknowledgment under this section. Cook v. Stellmon, 43 Idaho 433, 251 P. 957 (1927).

Payment of interest by one of two joint makers of note payable on demand did not suspend running of statute of limitations as to the other. Mahas v. Kasiska, 47 Idaho 179, 276 P. 315 (1928).

Administrator may waive the bar of the statute where he is the sole owner of the estate and there are no creditors other than the one whose right is thus extended. Holland Bank v. Brockman, 52 Idaho 324, 14 P.2d 621 (1932).

When action is in rem to foreclose mortgage debt, payments made by the owner of the redemption operate to keep the mortgage lien alive though the debt be barred against the original debtor. Holland Bank v. Brockman, 52 Idaho 324, 14 P.2d 621 (1932).

Cited in: Thomas v. Goff, 100 Idaho 282, 596 P.2d 794 (1979).

RESEARCH REFERENCES

Am. Jur. — 51 Am. Jur. 2d, Limitation of Actions, §§ 301, 304 to 338.

C.J.S. — 54 C.J.S., Limitations of Actions, § 305 et seq.

5-239. Actions barred in another state. — When a cause of action has arisen in another state or territory, or in a foreign country, and by the laws thereof an action thereon can not there be maintained against a person by reason of the lapse of time, an action thereon shall not be maintained against him in this state, except in favor of one who has been a citizen of this state and who has held the cause of action from the time it accrued.

History.

C.C.P. 1881, § 179; R.S., R.C., & C.L., § 4079; C.S., § 6632; I.C.A., § 5-239.

JUDICIAL DECISIONS

ANALYSIS

Application.
Constitutionality.
Construction.

Foreign actions.
Purpose.

Application.
Idaho's statute of limitation will apply only if the plaintiff is an Idaho citizen when the cause of action accrues. Miller v. Stauffer Chem. Co., 99 Idaho 299, 581 P.2d 345 (1978).

Constitutionality.
This section is not in violation of the fourteenth amendment of the United States Constitution, either as a violation of equal protection or the right to travel. Miller v. Stauffer Chem. Co., 99 Idaho 299, 581 P.2d 345 (1978).

Construction.
Where the statute of limitations of a foreign state is set up as a defense, it is error for the court, on motion, without a trial, to render a judgment of dismissal, for the reason that plaintiff, under § 5-812 (repealed), is deemed to have controverted the new matter thus set up as a defense, and defendant is put to his proof; the plaintiff may deny the existence of such statute of limitations as pleaded, or may confess and avoid it in any manner the law permits. Alspaugh v. Reid, 6 Idaho 223, 55 P. 300 (1898).

Where a resident of this state goes into the state of Washington and makes a partial payment upon a Washington contract after its maturity, and before such contract is barred by the statute of limitations of that state, upon his return to this state the contract follows him as made, and is enforceable under the laws of this state, and the statute of limitations of this state begins to run upon his reentry into this state, after such payment. Sterrett v. Sweeney, 15 Idaho 416, 98 P. 418 (1908).

The phrase "has arisen in another state" refers to and means the state in which the foreign contract is to be paid or discharged, and has no application to an intermediate state or foreign country through which the debtor may subsequently travel or in which he may reside for a sufficient length of time to constitute the bar of the statute of limitations of such state, prior to coming to this state, where an action is eventually commenced. West v. Theis, 15 Idaho 167, 96 P. 932 (1909).

"A cause of action arises" at the time and the place in the state or foreign country when and where the debt is to be paid or the contract performed and continues and follows the debtor until it is either barred by the statute of limitations of the state wherein it arose or until the debtor has lived within this state a sufficient length of time to bar it by the statute of limitations of this state. West v. Theis, 15 Idaho 167, 96 P. 932 (1909).

Foreign Actions.
Because an action which arose in Canada was not time barred in Canada when original or amended pleadings were filed in Idaho, the provisions of this section were not applicable and Idaho's limitation period applied. Attorney Gen. ex rel. Her Majesty the Queen in Right of Can. v. Tysowski, 118 Idaho 737, 800 P.2d 133 (Ct. App. 1990).

Purpose.
Borrowing statutes attempt to promote uniformity of limitation periods and to discourage forum shopping by requiring the trial court to "borrow" the statute of limitations of the jurisdiction that the legislature has determined bears the closest relationship to the action, usually the jurisdiction where the action arose. Miller v. Stauffer Chem. Co., 99 Idaho 299, 581 P.2d 345 (1978).

Cited in: First Trust & Sav. Bank v. Randall, 59 Idaho 705, 89 P.2d 741 (1939); Bankers Life & Cas. Co. v. Gilmore, 141 Bankr. 734 (Bankr. D. Idaho 1992).

RESEARCH REFERENCES

Am. Jur. — 51 Am. Jur. 2d, Limitation of Actions, §§ 99, 102, 105, 108, 110, 112, 113, 117.

C.J.S. — 54 C.J.S., Limitations of Actions, §§ 53 to 55.

5-240. "Action" includes special proceeding. — The word "action" as used in this chapter is to be construed, whenever it is necessary so to do, as including a special proceeding of a civil nature.

History.
C.C.P. 1881, § 181; R.S., R.C., & C.L., § 4080; C.S., § 6633; I.C.A., § 5-240.

JUDICIAL DECISIONS

Appointment of Administrator.
The word "action" includes proceedings for the appointment of an administrator. Gwinn v. Melvin, 9 Idaho 202, 72 P. 961 (1903).

Cited in: Nelson v. Steele, 12 Idaho 762, 88 P. 95 (1906); Rivera v. Johnston, 71 Idaho 70, 225 P.2d 858 (1950); Beale v. State, 139 Idaho 356, 79 P.3d 715 (2003).

RESEARCH REFERENCES

C.J.S. — 54 C.J.S., Limitations of Actions, § 59.

5-241. Accrual of actions arising out of the design or construction of improvement to real property. — Actions will be deemed to have accrued and the statute of limitations shall begin to run as to actions against any person by reason of his having performed or furnished the design, planning, supervision or construction of an improvement to real property, as follows:

(a) Tort actions, if not previously accrued, shall accrue and the applicable limitation statute shall begin to run six (6) years after the final completion of construction of such an improvement.

(b) Contract actions shall accrue and the applicable limitation statute shall begin to run at the time of final completion of construction of such an improvement.

The times fixed by these sections [this section] shall not be asserted by way of defense by any person in actual possession or control, as owner, tenant, or otherwise, of such an improvement at the time any deficiency in such an improvement constitutes the proximate cause of an injury or death for which it is proposed to bring an action.

Nothing in this section shall be construed as extending the period prescribed by the laws of this state for the bringing of any action.

As used in this section, the term "person" shall mean an individual, corporation, partnership, business trust, unincorporated organization, association, or joint stock company.

History.
I.C., § 5-241, as added by 1965, ch. 101, § 1, p. 187.

STATUTORY NOTES

Compiler's Notes.
The bracketed insertion, in the fourth paragraph, was added by the compiler to supply the presumed intended reference, as this section was the only code section affected by S.L. 1965, ch. 101.

JUDICIAL DECISIONS

ANALYSIS

Applicability.
Basis of action.
Claims untimely.
Constitutionality.
Estoppel.
Fixture.

Latent defects.
Negligent inspection.
Negligent installation.
Raising of affirmative defense.
Repair doctrine.
Running of statute.

Applicability.

Subsection (b) applied to professional malpractice claims arising from the final completion of construction, unless they had previously accrued, and since the date of accrual was undisputed by the parties and because it arose before the final completion of construction set out in subsection (a), that statute was inapplicable, and § 5-219 4. applied since the cause of action for professional malpractice accrued as of the time of the occurrence, act or omission complained of. Nerco Minerals Co. v. Morrison Knudsen Corp., 140 Idaho 144, 90 P.3d 894 (2004).

Basis of Action.

An action founded in contract and arising out of the design or construction of improvements to real property must be brought within five years from the date of the completion of the construction, and a cause of action founded in professional malpractice arising out of the design or construction of improvements to real property must be brought within two years of the discovery of the alleged malpractice and in no event later than eight years following the completion of the construction. Twin Falls Clinic & Hosp. Bldg. Corp. v. Hamill, 103 Idaho 19, 644 P.2d 341 (1982).

The department of transportation had a duty of ordinary care to protect against the danger created by the location of a southern driveway, and the possible supervisory role the department might have played in the construction of a northern driveway did not trigger the provisions in this section, nor did the statute of repose in this section apply. Esterbrook v. State, 124 Idaho 680, 863 P.2d 349 (1993).

Claims Untimely.

Where the owners of a poorly constructed clinic sued its architect eight years after the completion of the building, § 5-219 and this section barred all claims against the architect except those which rested upon fraudulent misrepresentations made by the architect. Twin Falls Clinic & Hosp. Bldg. Corp. v. Hamill, 103 Idaho 19, 644 P.2d 341 (1982).

Where homeowner commenced her personal injury action against previous homeowner within two years of sustaining injuries from the explosion of a woodburning stove, but where the construction of the stove, including the log-lighter device, was completed more than eight years before homeowner filed her complaint, her claim seeking to find the previous homeowner liable for the negligent design and construction of the stove was time-barred and properly dismissed. Barab v. Plumleigh, 123 Idaho 980, 853 P.2d 635 (Ct. App. 1993).

Constitutionality.

This section is not violative of the equal protection clause of the federal constitution because protecting against the litigation of stale claims is a legitimate state interest justifying a special classification for architects and builders. Twin Falls Clinic & Hosp. Bldg. Corp. v. Hamill, 103 Idaho 19, 644 P.2d 341 (1982).

Where there are valid differences supporting the legislative classification as between architects and builders on the one hand and owners, occupiers and material suppliers on the other, the various classes are not similarly situated and, therefore, this section does not violate Idaho Const., art. 3, § 19. Twin Falls Clinic & Hosp. Bldg. Corp. v. Hamill, 103 Idaho 19, 644 P.2d 341 (1982).

Estoppel.

The elements of equitable estoppel, the only non-statutory bar to a statute of limitations defense in Idaho, are: (1) a false representation or concealment of a material fact with actual or constructive knowledge of the truth; (2) that the party asserting estoppel did not know or could not discover the truth; (3) that the false representation or concealment was made with the intent that it be relied upon; and (4) that the person to whom the representation was made, or from whom the facts were concealed, relied and acted upon the representation or concealment to his prejudice. J.R. Simplot Co. v. Chemetics Int'l, Inc., 126 Idaho 532, 887 P.2d 1039 (1994).

Estoppel does not "extend" a statute of limitation. Rather, it prevents a party from pleading and utilizing the statute of limitation as a bar, although the time limit of the statute may have already run. J.R. Simplot Co. v. Chemetics Int'l, Inc., 126 Idaho 532, 887 P.2d 1039 (1994).

Fixture.

A fixture is "real property" for the purposes of this section. West v. El Paso Prods. Co., 122 Idaho 133, 832 P.2d 306 (1992).

Latent Defects.

Subdivision (a) of this section provides a limited discovery rule for tort claims arising

out of the design or construction of improvements to real property; this tolling can apply only to latent defects, as patent defects are deemed discovered. Hibbler v. Fisher, 109 Idaho 1007, 712 P.2d 708 (Ct. App. 1985).

Negligent Inspection.

Cause of action against architect alleging negligent inspection of apartment complex fell within this section, rather than § 5-219, because plaintiff's tort cause of action was one which arose out of the construction of an improvement to real property. Stephens v. Stearns, 106 Idaho 249, 678 P.2d 41 (1984).

Plaintiff clearly filed suit within the statutory limit where plaintiff's cause of action against architect accrued on the day she sustained her injuries, which was four years after architect's last chance to be negligent, which was the day on which he made his final inspection and where plaintiff filed suit within 16 months after her injury. Stephens v. Stearns, 106 Idaho 249, 678 P.2d 41 (1984).

Statement in *Twin Falls Clinic v. Hamill*, 103 Idaho 19, 644 P.2d 341 (1982) that this section engrafted a limited discovery exception in the area of tort liability arising out of the design or construction of improvements to real property, and that such exemption would only be applicable to latent defects since patent defects by definition would be those which should have been discovered, was not intended to be a broad statement expressing the general application of this section but rather, was an expression of how this section functions in the narrow setting of an action alleging defective design; where plaintiff had not sought to prove that defendant architect's design was defective, but alleged that he was negligent in his inspection of the apartment, such statement of law did not apply. Stephens v. Stearns, 106 Idaho 249, 678 P.2d 41 (1984).

Negligent Installation.

Where plaintiffs in an action alleging negligence in the installation of a water system did not discover latent defects before the end of the six-year accrual period allowed by this section, they had four more years under § 5-224 in which to file the negligence action. Since the action was commenced within the ten-year period, the negligence count was not barred by the applicable statute of limitation. Hibbler v. Fisher, 109 Idaho 1007, 712 P.2d 708 (Ct. App. 1985).

Raising of Affirmative Defense.

Defendant's delay of three years after filing of complaint in asserting an affirmative defense under this section did not provide a basis to deny the motion for leave to amend. The court observed that it is common for parties to use the pre-trial process to sort out their claims and defenses and to hone their legal arguments; additionally, it appears that defendant asserted the defense as soon as it discovered the facts necessary to support the claim. West v. El Paso Prods. Co., 122 Idaho 133, 832 P.2d 306 (1992).

Repair Doctrine.

The "repair doctrine" bars a contractor or vendor of faulty goods, who has discouraged the owner or purchaser from filing suit until the applicable statutes of limitation have run, from utilizing the statutes of limitations as a defense; such doctrine has not been subscribed to either as a version of equitable estoppel or an alternative means of barring or tolling a statute of limitations defense by the courts of Idaho. J.R. Simplot Co. v. Chemetics Int'l, Inc., 126 Idaho 532, 887 P.2d 1039 (1994).

Running of Statute.

This section clearly states that "[t]ort actions ... shall accrue and the applicable limitation statute shall begin to run six (6) years after the final completion of construction of such an improvement." That language simply cannot be construed to mean the statute begins to run on the date of injury. West v. El Paso Prods. Co., 122 Idaho 133, 832 P.2d 306 (1992).

A personal injury action founded upon the negligent design or construction of an improvement to real property must be brought within two years of the injuries, and in no event later than eight years following the completion of construction. Barab v. Plumleigh, 123 Idaho 980, 853 P.2d 635 (Ct. App. 1993).

The statute of repose is triggered by the completion of an improvement's construction, not its readiness for actual use. Barab v. Plumleigh, 123 Idaho 980, 853 P.2d 635 (Ct. App. 1993).

Cited in: Farber v. State, 102 Idaho 398, 630 P.2d 685 (1981); Boise Car & Truck Rental Co. v. WACO, Inc., 108 Idaho 780, 702 P.2d 818 (1985).

RESEARCH REFERENCES

A.L.R. — What constitutes "improvement to real property" for purposes of statute of repose or statute of limitations. 122 A.L.R.5th 1.

5-242. Ionizing radiation injuries — Purpose of act. — For purposes of this act, "ionizing radiation" means any particulate or electromagnetic radiation capable of producing ions directly or indirectly in its passage through matter; provided, however, that the provisions hereof and of sections 5-243 and 5-244, Idaho Code, shall not be deemed to apply to any action or proceeding to recover damages for professional malpractice, as defined in section 5-219, Idaho Code.

History.
1967, ch. 241, § 1, p. 704; am. 1976, ch. 184, § 1, p. 670.

STATUTORY NOTES

Compiler's Notes.
The words "this act" refer to S.L. 1967, ch. 241, §§ 1-3, compiled as §§ 5-242 to 5-244.

Section 2 of S.L. 1976, ch. 184, § 1 of which added the last proviso, read: "This act shall apply retroactively as respects all claims heretofore accrued and also to acts, errors or omissions heretofore or hereafter occurring."

Effective Dates.
Section 3 of S.L. 1976, ch. 184 declared an emergency. Approved March 19, 1976.

5-243. Limitation of action for ionizing radiation injuries. — No action or proceeding may be brought to recover for an ionizing radiation injury more than three (3) years after the person suffering such injury had knowledge or ought reasonably to have had knowledge of having suffered the injury and of the cause thereof, but in no event more than thirty (30) years from the date of the last occurrence to which the injury is attributed.

History.
1967, ch. 241, § 2, p. 704.

JUDICIAL DECISIONS

Cited in: Arnold v. Woolley, 95 Idaho 604, 514 P.2d 599 (1973).

5-244. Latent injury — Effect of prior recovery. — No action or proceeding to recover for latent ionizing radiation damage shall be barred by recovery in any earlier action or proceeding, unless the plaintiff in the earlier action or proceeding shall actually have been awarded damages for the latent injury, or shall have known or reasonably have been expected to know that such latent damage would occur, and its nature and extent with sufficient particularity to establish entitlement to a specific amount of damages on account thereof.

History.
1967, ch. 241, § 3, p. 704.

JUDICIAL DECISIONS

ANALYSIS

In general.
Tort claims.

In General.

Under this section, a person could maintain an action for severe ionizing radiation burns at the time of exposure and still maintain another action for latent cancer which the radiation was proved to have caused twenty years later. Arnold v. Woolley, 95 Idaho 604, 514 P.2d 599 (1973).

Tort Claims.

Section 6-911 is the applicable statute of limitation under the Idaho Tort Claims Act. No other statute of limitation applies. Carman v. Carman, 114 Idaho 551, 758 P.2d 710 (Ct. App. 1988).

5-245. Actions to collect child support arrearages. — An action or proceeding to collect child support arrearages must be commenced within five (5) years after the child reaches the age of majority or within five (5) years after the child's death, if death occurs before the child reaches majority. An action or proceeding under this section shall include, but is not limited to, execution on the judgment, order to show cause, garnishment, income withholding, income tax offset or lottery prize offset.

History.

I.C., § 5-245, as added by 1988, ch. 199, § 1, p. 378; am. 1995, ch. 264, § 1, p. 846; am. 1996, ch. 56, § 1, p. 167.

JUDICIAL DECISIONS

ANALYSIS

Application.
Legislative intent.
Renewal of judgment.

Application.

In a case for child support arrearages stemming back to 1979, this section and § 5-215 were correctly applied to allow the mother to collect all arrearages from the enactment of this section in 1988 forward, as well as arrearages which had accrued within six years from the 1988 enactment of this section. Stonecipher v. Stonecipher, 131 Idaho 731, 963 P.2d 1168 (1998).

Legislative Intent.

The intent of the legislature in enacting this section was to extend the viability of judgments and, thus, increase the term of a child support judgment to a child's twenty-third birthday. Thomas v. Worthington, 132 Idaho 825, 979 P.2d 1183 (1999).

Renewal of Judgment.

Where a district court judge incorrectly interpreted this section to include a complaint for renewal of judgment for past child support arrearages as an action or proceeding to collect past child support obligations, an attempt at execution of a judgment after the children reached their twenty-third birthdays was not within the statute of limitations. Thomas v. Worthington, 132 Idaho 825, 979 P.2d 1183 (1999).

5-246. Prescriptive overflow easements. — In conformity with the limitations of actions time period set forth in sections 5-203 through 5-206, Idaho Code, the owner of a dam shall be deemed to have obtained a nonexclusive prescriptive overflow easement over real property which has been inundated or overflowed by the operations of the dam for at least a part of a year for any consecutive five (5) year period prior to commencement of an action by the property owner seeking relief inconsistent with such nonexclusive prescriptive overflow easement. Said dam owner shall be deemed to have not forfeited said nonexclusive prescriptive overflow easement if the reason for the failure to exercise the easement is a lack of water caused by drought or acts of God.

It is further provided that if a dam has inundated or overflowed real property for at least a part of a year for the five (5) consecutive years prior

to the enactment of this section, then the owner of the dam shall be deemed to have obtained a nonexclusive prescriptive overflow easement hereunder over said real property one (1) year after the enactment of this section, provided, no action seeking relief inconsistent with such nonexclusive prescriptive overflow easement has been commenced by the property owner within one (1) year of the enactment of this section. The provisions of this section shall not be construed to affect the riparian and littoral rights of property owners to have access to and use of waters in this state, or to restrict any use of the underlying property for any purpose otherwise consistent with ownership thereof, even if said use reasonably interferes with the storage of water on the property, but said use shall not unreasonably interfere with the storage of water on the property. Nothing herein shall be deemed to affect any prescriptive overflow easement that any dam owner may have previously acquired under common law. The provisions of this section shall not be construed to apply to the beds of navigable waters lying below the natural or ordinary high watermark as defined in subsection (c) of section 58-1302, Idaho Code, and subsection (9) of section 58-104, Idaho Code, or any other lands owned by the state of Idaho.

History.
I.C., § 5-246, as added by 1991, ch. 328, § 1, p. 845; am. 1991, ch. 267, § 1, p. 657; am. 2010, ch. 144, § 1, p. 305.

STATUTORY NOTES

Amendments.
The 2010 amendment, by ch. 144, in the second sentence in the last paragraph, inserted "reasonably" following "even if said use" and added "but said use shall not unreasonably interfere with the storage of water on the property."

JUDICIAL DECISIONS

Cited in: Baranick v. North Fork Reservoir Co., 127 Idaho 482, 903 P.2d 71 (1995).

5-247. Limitation on suits against a firearms or ammunition manufacturer, trade association or seller — Limitation on right to bring suit or recover damages. — (1) In this section, "governmental unit" means:

(a) A political subdivision of the state, including a municipality or county; and

(b) Any other agency of government whose authority is derived from the laws or constitution of this state.

(2) Except as provided by subsection (3) of this section, a governmental unit may not bring suit against a firearms or ammunition manufacturer, trade association or seller for recovery of damages resulting from, or injunctive relief or abatement of a nuisance relating to, the lawful design, manufacture, marketing or sale of firearms or ammunition to the public.

(3) A governmental unit on behalf of the state or any other governmental unit may bring a suit described by subsection (2) of this section if the suit is approved in advance by the legislature by adoption of a concurrent resolu-

tion or by enactment of a statute. This subsection does not create a cause of action.

(4) Nothing in this section shall prohibit a governmental unit from bringing an action against a firearms manufacturer, trade association or seller for recovery of damages for:

(a) Breach of contract or warranty as to firearms or ammunition purchased by a governmental unit;

(b) Damage or harm to property owned or leased by the governmental unit caused by a defective firearm or ammunition; or

(c) Injunctive relief to enforce a valid ordinance, statute or rule.

(5) Nothing in this section shall prohibit the attorney general from bringing a suit described by subsection (2) of this section on behalf of the state or any other governmental unit. This subsection does not create a cause of action.

History.
I.C., § 5-247, as added by 2000, ch. 470, § 1, p. 1600.

STATUTORY NOTES

Compiler's Notes.
S.L. 2000, ch. 150, § 1, effective July 1, 2000, and ch. 470, § 1, effective April 17, 2000, purported to enact a new section of chapter 2, title 5, Idaho Code, designated as § 5-247. Since § 5-247 as enacted by ch. 470, § 1 became effective first, it has been compiled as § 5-247, and § 5-247 as enacted by ch. 150, § 1, has been compiled as § 5-248. The recompilation of the section enacted by S.L. 2000, ch. 150, as § 5-248, was made permanent by S.L. 2005, ch. 25.

Effective Dates.
Section 2 of S.L. 2000, ch. 470 declared an emergency. Approved April 17, 2000.

5-248. Victims of crimes. — (1) For the purpose of any civil action or proceeding brought by a victim of a crime against an offender who committed the crime, for any losses incurred by the victim, which loss was proximately caused by the crime, the limitation periods prescribed by this chapter shall be tolled until one (1) year after the offender has been released from any sentence of incarceration served for that crime and in full satisfaction of the sentence imposed.

(2) For purposes of this section "full satisfaction of the sentence imposed" means the full-term release date from incarceration for the crime committed against the victim or the full-term release date from incarceration for any other crime for which the offender is serving time concurrently with, or consecutively to, time served for the crime against the victim, whichever is later.

History.
I.C., § 5-247, as added by 2000, ch. 150, § 1, p. 386; am. and redesig. 2005, ch. 25, § 1, p. 82.

STATUTORY NOTES

Compiler's Notes.
S.L. 2000, ch. 150, § 1, effective July 1, 2000, and ch. 470, § 1, effective April 17, 2000, purported to enact a new section of chapter 2, title 5, Idaho Code, designated as § 5-247. Since § 5-247 as enacted by ch. 470, § 1 became effective first, it has been compiled as § 5-247, and § 5-247 as enacted by

ch. 150, § 1, has been compiled as § 5-248. The recompilation of the section enacted by S.L. 2000, ch. 150, as § 5-248, was made permanent by S.L. 2005, ch. 25.

Effective Dates.

Section 2 of S.L. 2000, ch. 150, provided that the act shall be in full force and effect on and after July 1, 2000.

CHAPTER 3

PARTIES TO ACTIONS

5-301. Real party in interest. [Repealed.]

STATUTORY NOTES

Compiler's Notes.

This section, which comprised C.C.P. 1881, § 182; R.S., R.C., & C.L., § 4090; C.S., § 6634; I.C.A., § 5-301, was repealed by S.L. 1975, ch. 242, § 1, effective March 31, 1975. For present rule, see Idaho Civil Procedure Rule 17(a).

5-302. Assignment of thing in action. — In the case of an assignment of a thing in action, the action by the assignee is without prejudice to any set-off, or other defense existing at the time of, or before, notice of the assignment; but this section does not apply to a negotiable instrument transferred, in good faith and upon good consideration, before maturity.

History.

C.C.P. 1881, § 183; R.S., R.C., & C.L., § 4091; C.S., § 6635; I.C.A., § 5-302.

JUDICIAL DECISIONS

ANALYSIS

Action against insurance carrier.
Agreement to waive implied warranties after assignment.
Cost bill.
Counterclaim.
Effect of tender to assignor.
Fraud in sale of stock.
Notice of transfer.

Action Against Insurance Carrier.

The provisions and procedures contemplated by § 11-507 are applicable to a cause of action belonging to judgment debtors against their insurance carriers based on wrongful refusal by carriers to settle claims against judgment debtors within policy limits, which cause arises from the contractual obligation of the carriers and is a thing in action arising out of violation of an obligation and, thus, assignable under this section and § 55-402. Whitehead v. Van Leuven, 347 F. Supp. 505 (D. Idaho 1972).

Agreement to Waive Implied Warranties After Assignment.

A provision in a conditional sales contract that it might be assigned to a named bank without notice to purchaser, and when assigned should be free from any defense, counter-claim, or cross-complaint by the purchaser, is valid and will bar the defense of a breach of implied warranty. United States ex rel. Adm'r of Fed. Hous. Admin. v. Troy-Parisian, Inc., 115 F.2d 224 (9th Cir. 1940), cert. denied, 312 U.S. 699, 61 S. Ct. 739, 85 L. Ed. 1133 (1941).

Cost Bill.

The assignee of a cost bill takes the same subject to any right of offset against the bill existing at the time of the assignment. Northwestern & Pac. Hypotheek Bank v. Rauch, 8 Idaho 50, 66 P. 807 (1901).

Counterclaim.

Defendant, in action by endorsee of non-negotiable note, may file counterclaim alleging that commodities purchased were of no value. Security Fin. Co. v. Jensen Auto Co., 48 Idaho 376, 282 P. 88 (1929).

Effect of Tender to Assignor.

Tender of amount of mortgage to mortgagee who has, without knowledge of mortgagor, assigned mortgage has no effect on rights of assignee to foreclose after default nor does such tender discharge mortgage lien. McClellan v. Davis, 45 Idaho 541, 263 P. 1002 (1928).

Fraud in Sale of Stock.

Cause of action for fraud in sale of stock is assignable. MacLeod v. Stelle, 43 Idaho 64, 249 P. 254 (1926).

Notice of Transfer.

Payment to assignor of non-negotiable note before notice of assignment discharges the obligation. Uhlig v. Diefendorf, 53 Idaho 676, 26 P.2d 801 (1933).

Cited in: McCornick & Co. v. Gem State Oil & Prods. Co., 38 Idaho 470, 222 P. 286 (1923); McCluskey v. Galland, 95 Idaho 472, 511 P.2d 289 (1973).

RESEARCH REFERENCES

Am. Jur. — 6 Am. Jur. 2d, Assignments, § 44 et seq.
59 Am. Jur. 2d, Parties, §§ 29 to 32.

C.J.S. — 6A C.J.S., Assignments, § 107.

A.L.R. — Right of heir's assignee to contest will. 39 A.L.R.3d 696.

5-303. Actions by executors, trustees and board of control. [Repealed.]

STATUTORY NOTES

Compiler's Notes.

This section, which comprised C.C.P. 1881, § 184; R.S., R.C., & C.L., § 4092; C.S., § 6636; I.C.A., § 5-303; am. 1939, ch. 184, § 1, p. 351, was repealed by S.L. 1975, ch. 242, § 1, effective March 31, 1975. For present rule, see Idaho Civil Procedure Rule 17(a).

5-304. Married women as parties. — A woman may while married sue and be sued in the same manner as if she were single: provided, that except in actions between husband and wife the husband shall not be chargeable in any manner with the wife's costs or other expenses of suit.

History.
1903, p. 345, § 3; reen. R.C. & C.L., § 4093; C.S., § 6637; I.C.A., § 5-304.

STATUTORY NOTES

Cross References.
Married woman as defendant in summary proceedings for obtaining possession of real property, § 6-308.

Compiler's Notes.
This section repealed by implication R.S., § 4093 which provided that "when a married woman is a party her husband must be joined with her" except in certain cases.

The remainder of the act from which this section is taken, and which deals with the property rights of married women is compiled as §§ 32-903 to 32-905.

JUDICIAL DECISIONS

Analysis

Community property.
Contracts of married women.
Former law.
Husband as defendant.
Wife's separate property.

Community Property.
Where an action is brought by a married woman in her own name to foreclose a mortgage and defendant's answer avers that the mortgaged property is community property and sets up an offset against the husband and asks to have him made a party plaintiff, it was error to refuse. Campbell v. Kerns, 13 Idaho 287, 90 P. 108 (1907).

Wife may sue for protection of community property where husband fails or neglects to institute proper actions. Muir v. Pocatello, 36 Idaho 532, 212 P. 345 (1922).

Contracts of Married Women.
Married woman may contract for improvements upon her separate property. Bassett v. Beam, 4 Idaho 106, 36 P. 501 (1894).

A married woman may contract debts for the use and benefit of her separate property, or for her own use and benefit, and, thereby, charge her separate property. Dernham v. Rowley, 4 Idaho 753, 44 P. 643 (1896).

Former Law.
Under Rev. Stat. 1887, § 4093 (repealed by implication), husband was required to be joined with wife when she had a cause of action for personal injuries. Lindsay v. Oregon S. L. R.R., 13 Idaho 477, 90 P. 984 (1907) (see Compiler's Notes, above).

Husband as Defendant.
Where plaintiff brought an action for damages to her person and character for torts committed against her during coverture, she may join her husband as a party defendant, if he participated in the wrongs, as constitution and statutes as a whole removed common law rule that a married woman could not sue her husband for wrongs committed by him against her person. Lorang v. Hays, 69 Idaho 440, 209 P.2d 733 (1949).

Wife's Separate Property.
Husband is proper, though not necessary, party to action affecting wife's separate property. McShane v. Quillin, 47 Idaho 542, 277 P. 554 (1929).

Cited in: Vermont Loan & Trust Co. v. McGregor, 5 Idaho 510, 51 P. 104 (1897); Edminston v. Smith, 13 Idaho 645, 92 P. 842 (1907).

RESEARCH REFERENCES

C.J.S. — 41 C.J.S., Husband and Wife, § 349 et seq.

5-305. Husband and wife sued together. — If a husband and wife be sued together the wife may defend her own right, and if the husband neglect to defend she may defend for his right also.

History.
C.C.P. 1881, § 186; R.S., R.C., & C.L., § 4094; C.S., § 6638; I.C.A., § 5-305.

JUDICIAL DECISIONS

ANALYSIS

Disclaimer of husband.
Failure to serve wife.
Testimony of wife.

Disclaimer of Husband.
In an action against husband and wife relating to a water right appurtenant to real estate occupied by them as a residence, a disclaimer filed therein by the husband does not affect the right of the wife, and she may defend the action in her own name; the only effect of such disclaimer is that husband refuses to defend the action. Stowell v. Tucker, 7 Idaho 312, 62 P. 1033 (1900).

Failure to Serve Wife.
Wife is not bound by decree foreclosing mortgage on community property, though made a party defendant, but not served or not voluntarily appearing. Civils v. First Nat'l Bank, 41 Idaho 690, 241 P. 1023 (1925).

Testimony of Wife.
The wife may testify in action in regard to the contract sued on. Larson v. Carter, 14 Idaho 511, 94 P. 825 (1908).

Cited in: Dernham v. Rowley, 4 Idaho 753, 44 P. 643 (1896); Overland Nat'l Bank v. Halveston, 33 Idaho 489, 196 P. 217 (1921).

RESEARCH REFERENCES

Am. Jur. — 41 Am. Jur. 2d, Husband and Wife, §§ 208, 209.

C.J.S. — 41 C.J.S., Husband and Wife, § 349 et seq.

5-306. Infants and insane persons — Guardians ad litem. — When an infant or an insane or incompetent person is a party, he must appear either by his general guardian or by a guardian ad litem appointed by the court in which the action is pending in each case, or by a judge thereof, or a probate judge. A guardian ad litem may be appointed in any case when it is deemed by the court in which the action or proceeding is prosecuted, or by a judge thereof, expedient, to represent the infant, insane or incompetent person in the action or proceeding, notwithstanding he may have a general guardian and may have appeared by him.

History.
C.C.P. 1881, § 187; R.S., R.C., & C.L., § 4095; C.S., § 6639; I.C.A., § 5-306.

STATUTORY NOTES

Cross References.
Appointment of guardians ad litem, Idaho Civil Procedure Rule 17(c).

JUDICIAL DECISIONS

ANALYSIS

Application in General.

Infant must appear by guardian who must be made a party to the action and appear for his ward; infant's representation by attorney is insufficient. Hutton v. Davis, 56 Idaho 231, 53 P.2d 345 (1935).

There must be a pending action in which the infant has been served with process before the appointment of a guardian ad litem; the court must acquire jurisdiction over the infant before this section can apply; the appointment of a guardian ad litem is a matter of procedure and not of jurisdiction. Trolinger v. Cluff, 56 Idaho 570, 57 P.2d 332 (1936).

Appointment after Trial.

The appointment of a guardian ad litem after the trial of a case and on the hearing of a motion for new trial, by an order of the trial court nunc pro tunc, is not a jurisdictional defect, but at most an irregularity which does not of itself vitiate the proceedings. Trask v. Boise King Placers Co., 26 Idaho 290, 142 P. 1073 (1914).

Effect of Failure to Appoint Guardian.

The effect of failure to appoint a guardian ad litem, where one is required by law, does not deprive the court of jurisdiction or power to act, and neither is the judgment rendered void; but a judgment rendered therein may be set aside thereafter on appropriate proceedings by the minor. Trolinger v. Cluff, 56 Idaho 570, 57 P.2d 332 (1936).

Immunities.

Since a guardian ad litem appointed under this section must act in the best interest of the child and not the parents, and it is absolutely essential that guardians are free to make such a determination without fear that a parent seeking a larger award or settlement will later sue the guardian for legal malpractice, guardians ad litem so appointed operate under the cloak of absolute quasi-judicial immunity; however, this does not leave the parties without recourse for they may object to the appointment or seek an appeal of a position adverse to that of the guardian or the court may reject the guardian's recommendation or even remove a guardian who is not performing his duties. McKay v. Owens, 130 Idaho 148, 937 P.2d 1222 (1997).

Legal Capacity to Sue.

Any person of sound mind, lawful age, and under no restraint or legal disability has the "legal capacity to sue," which means the right to come into court and that the plaintiff is free from general disability such as infancy or insanity, or if he sues as a representative that he possess the character in which he sues. American Home Benefit Ass'n v. United Am. Benefit Ass'n, 63 Idaho 754, 125 P.2d 1010 (1942).

A complaint is not demurrable on the ground that the plaintiff did not have the legal capacity to sue, where the complaint did not disclose that there was a legal disability of the plaintiff to prosecute the action, such as insanity, minority, or the like. American Home Benefit Ass'n v. United Am. Benefit Ass'n, 63 Idaho 754, 125 P.2d 1010 (1942).

Nonresident as Guardian.

It is not error to appoint a nonresident as guardian ad litem, although there is a general guardian, where the court is satisfied that the interest of the minor requires it. Pine v. Callahan, 8 Idaho 684, 71 P. 473 (1902).

Cited in: Doe v. Durtschi, 110 Idaho 466, 716 P.2d 1238 (1986); Berg v. Kendall, 147 Idaho 571, 212 P.3d 1001 (2009).

RESEARCH REFERENCES

Am. Jur. — 42 Am. Jur. 2d, Infants, §§ 149, 154 to 157.
59 Am. Jur. 2d, Parties, §§ 37, 38.

C.J.S. — 43 C.J.S., Infants, § 312.
57 C.J.S., Mental Health, § 300 et seq.

5-307. Appointment of guardian ad litem. [Repealed.]

STATUTORY NOTES

Compiler's Notes.
This section, which comprised C.C.P. 1881, § 188; R.S., R.C., & C.L., § 4096; C.S., § 6640; I.C.A., § 5-307, was repealed by S.L. 1975, ch. 242, § 1, effective March 31, 1975. For present rule, see Idaho Civil Procedure Rule 17(c).

5-308. Action for seduction. — An unmarried female may prosecute, as plaintiff, an action for her own seduction, and may recover therein such damages, pecuniary or exemplary, as are assessed in her favor.

History.
C.C.P. 1881, § 189; R.S., R.C., & C.L., § 4097; C.S., § 6641; I.C.A., § 5-308.

JUDICIAL DECISIONS

ANALYSIS

Damages.
Evidence.
Pregnancy.

Damages.
Three thousand dollars ($3,000) to twenty-one (21) year old single woman for second seduction by same defendant was not excessive. Kramlick v. Shuttleworth, 49 Idaho 424, 289 P. 74 (1930).

Evidence.
The trial court did not err in refusing to grant defendant's motion for nonsuit and directed verdict, upon the ground that the evidence was insufficient to show seduction of plaintiff by defendant. Seamons v. Spackman, 81 Idaho 361, 341 P.2d 442 (1959).

Pregnancy.
The gravamen of the action for seduction, contemplated by this section, is not pregnancy, although pregnancy may be a consideration in the enhancement of damages. Seamons v. Spackman, 81 Idaho 361, 341 P.2d 442 (1959).

RESEARCH REFERENCES

Am. Jur. — 70 Am. Jur. 2d, Seduction, § 49.
A.L.R. — Action for intentional infliction of emotional distress against paramours. 99 A.L.R.5th 445.

5-309. Action for seduction — Prosecution by parent or guardian. — The parents may prosecute as plaintiffs for the seduction of a daughter under the age of majority at the time of the seduction, and the guardian for the seduction of a ward under the age of majority at the time of seduction, though the daughter or ward be not living with or in the service of the plaintiff or plaintiffs at the time of the seduction, or afterward, and there be no loss of service, but if either the father or mother be dead or has abandoned his or her family, the other is entitled to sue alone.

History.
C.C.P. 1881, § 1901; R.S. & R.C., § 4098; am. 1915, ch. 120, § 2, p. 266; reen. C.L., § 4098; C.S., § 6642; I.C.A., § 5-309.

RESEARCH REFERENCES

Am. Jur. — 70 Am. Jur. 2d, Seduction, § 49 et seq.

5-310. Action for injury to unmarried child. — The parents may maintain an action for the injury of an unmarried minor child, and for the injury of a minor child who was married at the time of his injury and whose spouse died as a result of the same occurrence and who leaves no issue, and a guardian for the injury of his ward, when such injury is caused by the wrongful act or neglect of another, but if either the father or mother be dead or has abandoned his or her family, the other is entitled to sue alone. Such action may be maintained against the person causing the injury, or if such person be employed by another person, who is responsible for his conduct, also against such other person.

History.
C.C.P. 1881, § 191; R.S. & R.C., § 4099; am. 1915, ch. 120, § 3, p. 266; reen. C.L., § 4099; C.S., § 6643; I.C.A., § 5-310; am. 1972, ch. 177, § 1, p. 444; am. 1984, ch. 158, § 1, p. 385.

JUDICIAL DECISIONS

ANALYSIS

Abandonment.

In the absence of a proceeding terminating the parent-child relationship, a sole surviving parent's abandonment of a child will not, in and of itself, preclude maintenance of an action to recover for wrongful death; the fact of abandonment if found by a jury, may operate to mitigate the amount of damages recoverable. Black v. Reynolds, 109 Idaho 277, 707 P.2d 388 (1985), overruled on other grounds, Stewart v. Rice, 120 Idaho 504, 817 P.2d 170 (1991).

Where there has been a proceeding resulting in the termination of the parent-child relationship, an abandoning parent would have no right to recover for a child's wrongful death regardless of whether the other parent was alive or dead, his or her own parental status having been legally extinguished. Black v. Reynolds, 109 Idaho 277, 707 P.2d 388 (1985), overruled on other grounds, Stewart v. Rice, 120 Idaho 504, 817 P.2d 170 (1991).

This section merely confers a preference to the non-abandoning parent to bring a wrongful death cause of action where both parents are alive; it does not deprive a sole surviving abandoning parent of a cause of action. Black v. Reynolds, 109 Idaho 277, 707 P.2d 388 (1985), overruled on other grounds, Stewart v. Rice, 120 Idaho 504, 817 P.2d 170 (1991).

Amount of Recovery.

In action by parents to recover damages for injury to minor child, amount of damages recovered depends on the circumstances of the case and what is just. Hayward v. Yost, 72 Idaho 415, 242 P.2d 971 (1952).

In action for wrongful death of a minor child, the verdict in each case should be weighed against the circumstances peculiar to that case and the trial court should act to reduce jury verdict only when it is not just considering all the circumstances. Meissner v. Smith, 94 Idaho 563, 494 P.2d 567 (1972).

There is no special, discrete limitation as a matter of law upon recovery for the wrongful death of a child. Packard v. Joint Sch. Dist.

No. 171, 104 Idaho 604, 661 P.2d 770 (Ct. App. 1983).

Contributory Negligence.

The contributory or comparative negligence of parents may be raised as a defense in a wrongful death action brought by parents of a deceased child. The principle behind the allowance of such a defense is that no one should be permitted to profit from his own wrong. Nelson v. Northern Leasing Co., 104 Idaho 185, 657 P.2d 482 (1983).

The negligence of the parents may be asserted as a defense in an action brought by the parents for the wrongful death of a child. Nelson v. Northern Leasing Co., 104 Idaho 185, 657 P.2d 482 (1983).

Elements of Damages.

In determination of damages to be awarded parents of injured minor child, amount of contributions child would have contributed to parents until majority, except for injury, and loss of protection, comfort, society and companionship are proper elements to be considered. Hayward v. Yost, 72 Idaho 415, 242 P.2d 971 (1952).

Instructions.

Instruction, in suit by parents to recover damages for brain injury of child, which stated that parents may be awarded a reasonable amount for any worry or mental distress they may have suffered by reason of injuries to child was error. Hayward v. Yost, 72 Idaho 415, 242 P.2d 971 (1952).

Where school district defending wrongful death action made no affirmative showing that the jury went beyond the trial judge's instruction and improperly considered such elements as grief or mental anguish, and the record revealed no testimony specifically concerning grief or mental anguish, nor any arguments of counsel urging recovery for such factors, the trial court did not commit reversible error by refusing to give the supplementary instructions on exclusion of these elements which were requested by the school district. Packard v. Joint Sch. Dist. No. 171, 104 Idaho 604, 661 P.2d 770 (Ct. App. 1983).

Nature of Action.

The actions authorized by this section and § 5-311 are not actions arising from the "surviving" rights of a decedent, but rather are compensatory in character for the benefit of the named survivors. Volk v. Baldazo, 103 Idaho 570, 651 P.2d 11 (1982) (decision prior to 1984 amendment.).

Parental Immunity.

Where plaintiff was a widow suing on a wrongful death action for loss of a child, she was not suing on behalf of the child; thus, defendant's third party claim against plaintiff's deceased husband's estate for indemnity or contribution by virtue of the deceased's alleged negligence was not barred by the doctrine of parental immunity. Schiess v. Bates, 107 Idaho 794, 693 P.2d 440 (1984).

Prenatal Injuries.

A cause of action will lie on behalf of a viable child who sustains prenatal injuries, but is subsequently born alive, if at the time of injury the fetus was viable. Volk v. Baldazo, 103 Idaho 570, 651 P.2d 11 (1982).

Under § 5-311, viability marks the beginning of legal personhood, and the right to assert a cause of action for the wrongful death of a fetus is correspondingly limited to cases involving the death of a viable fetus. Santana v. Zilog, Inc., 878 F. Supp. 1373 (D. Idaho 1995), aff'd, 95 F.3d 780 (9th Cir. 1996).

Sufficiency of Complaint.

Complaint for death of minor aged 16, who drowned when his tractor overturned in a drain ditch when minor fell asleep, did not state a cause of action under this section where complaint failed to allege that death was due to long hours at night, though child had been employed to work on 12 hour shift at night. Shirts v. Shultz, 76 Idaho 463, 285 P.2d 479 (1955).

Type of Action.

The actions authorized by this section and § 5-311 are not actions arising for the surviving rights of a decedent, but rather are compensatory and enacted for the benefit of the named survivors. Vulk v. Haley, 112 Idaho 855, 736 P.2d 1309 (1987).

Unborn Child.

Since the term "minor child" marks the upper age beyond which a parent's cause of action may not extend under this section, parents have a right of action only if their child suffers wrongful death before reaching the age of 18 and a lower age limitation is neither implied nor necessary; therefore, an unborn viable child has legal existence and rights and is easily considered within the meaning of the term "minor child" and an action for wrongful death will lie on behalf of a viable unborn fetus who died of injuries and, hence, was not born alive. Volk v. Baldazo, 103 Idaho 570, 651 P.2d 11 (1982).

Cited in: Union Pac. R.R. v. Jarrett, 381 F.2d 597 (9th Cir. 1967); Trask v. Boise King Placers Co., 26 Idaho 290, 142 P. 1073 (1914); Shaddy v. Daley, 58 Idaho 536, 76 P.2d 279 (1938); Moon v. Bullock, 65 Idaho 594, 151 P.2d 765 (1944); Bass v. Quinn-Robbins Co., 70 Idaho 308, 216 P.2d 944 (1950); Petersen v. Parry, 92 Idaho 647, 448 P.2d 653 (1968); Harrigfeld v. District Court of Seventh Judicial Dist., 95 Idaho 540, 511 P.2d 822 (1973); Berg v. Kendall, 147 Idaho 571, 212 P.3d 1001 (2009).

RESEARCH REFERENCES

Am. Jur. — 22A Am. Jur. 2d, Death, §§ 108, 110, 112, 113, 128.

C.J.S. — 25A C.J.S., Death, §§ 56, 57.

A.L.R. — Employer's liability for injury to wife or child of employee through latter's negligence. 1 A.L.R.3d 677.

Private owner's liability to trespassing children for injuries sustained by sleighing, tobogganing, skiing, skating or otherwise sliding on his land. 19 A.L.R.3d 184.

Liability for injury or death of child social guest. 20 A.L.R.3d 1127.

Railroad's liability for injury to or death of child climbing or playing on moving train other than as paying or proper passenger. 35 A.L.R.3d 9.

Liability of owner or operator of store or similar place of business for injury to child climbing or playing on furniture, fixtures, displays, or the like. 50 A.L.R.3d 1227.

Parent's desertion, abandonment, or failure to support minor child as affecting right or measure of recovery for wrongful death of child. 53 A.L.R.3d 566.

Permitting child to walk to school unattended as contributory negligence of parents in action for injury or death of child. 62 A.L.R.3d 541.

Liability for injury or death of minor or other incompetent inflicted upon himself by gun made available by defendant. 75 A.L.R.3d 825.

Products liability: Toys and games. 95 A.L.R.3d 390.

Liability of one who sells gun to child for injury to third party. 4 A.L.R.4th 331.

Negligence of one parent contributing to injury or death of child as barring or reducing damages recoverable by other parent for losses suffered by other parent as result of injury or death of child. 26 A.L.R.4th 396.

Recovery of damages for grief or mental anguish resulting from death of child — modern cases. 45 A.L.R.4th 234.

Recovery of damages for loss of consortium resulting from death of child — modern status. 77 A.L.R.4th 411.

5-311. Suit for wrongful death by or against heirs or personal representatives — Damages. — (1) When the death of a person is caused by the wrongful act or neglect of another, his or her heirs or personal representatives on their behalf may maintain an action for damages against the person causing the death, or in case of the death of such wrongdoer, against the personal representative of such wrongdoer, whether the wrongdoer dies before or after the death of the person injured. If any other person is responsible for any such wrongful act or neglect, the action may also be maintained against such other person, or in case of his or her death, his or her personal representatives. In every action under this section, such damages may be given as under all the circumstances of the case as may be just.

(2) For the purposes of subsection (1) of this section, and subsection (2) of section 5-327, Idaho Code, "heirs" means:

(a) Those persons who would be entitled to succeed to the property of the decedent according to the provisions of subsection (22) of section 15-1-201, Idaho Code.

(b) Whether or not qualified under subsection (2)(a) of this section, the decedent's spouse, children, stepchildren, parents, and, when partly or wholly dependent on the decedent for support or services, any blood relatives and adoptive brothers and sisters. It includes the illegitimate child of a mother, but not the illegitimate child of the father unless the father has recognized a responsibility for the child's support.

1. "Support" includes contributions in kind as well as money.

2. "Services" means tasks, usually of a household nature, regularly performed by the decedent that will be a necessary expense to the heirs of the decedent. These services may vary according to the identity of the

decedent and heir and shall be determined under the particular facts of each case.

(c) Whether or not qualified under subsection (2)(a) or (2)(b) of this section, the putative spouse of the decedent, if he or she was dependent on the decedent for support or services. As used in this subsection, "putative spouse" means the surviving spouse of a void or voidable marriage who is found by the court to have believed in good faith that the marriage to the decedent was valid.

(d) Nothing in this section shall be construed to change or modify the definition of "heirs" under any other provision of law.

History.

I.C., § 5-311, as added by 1984, ch. 158, § 3, p. 385; am. 2010, ch. 349, § 1, p. 911.

STATUTORY NOTES

Cross References.

Consolidation of pending actions between same parties, Idaho Civil Procedure Rule 42(a).

Death of wrongdoer, survival of action, § 5-327.

Prior Laws.

Former § 5-311, which comprised C.C.P. 1881, § 192; R.S., R.C., & C.L., § 4100; C.S., § 6644; I.C.A., § 5-311; am. 1972, ch. 177, § 2, p. 444, was repealed by S.L. 1984, ch. 158, § 2.

Amendments.

The 2010 amendment, by ch. 349, inserted "and subsection (2) of section 5-327, Idaho Code" in the introductory paragraph in subsection (2) and updated the statutory reference in paragraph (2)(a).

JUDICIAL DECISIONS

Analysis

Burden of proof.
Circumstances subsequent to wrongful death.
Decedent's negligence.
Heirs.
In general.
Pain and suffering.
Purpose.
Retroactivity.
Rights of heirs.
Standing.
Unborn child.

Burden of Proof.

To sustain an action for damages an heir must prove that the wrongful act or negligence of the defendant caused the injury or resulting death. Turpen v. Granieri, 133 Idaho 244, 985 P.2d 669 (1999).

Circumstances Subsequent to Wrongful Death.

Wrongful death actions are designed to reimburse heirs for the expectations of parental beneficence they would have received, had the decedent lived; this regime does not allow for consideration of financial and other circumstances that arise subsequent to the death of a parent who is survived by heirs, such as plaintiff's remarriage subsequent to the loss of her husband. Westfall v. Caterpillar, Inc., 120 Idaho 918, 821 P.2d 973 (1991).

Decedent's Negligence.

Plaintiffs can recover for wrongful death only when the wrongful act would have entitled the person injured to maintain an action if death had not ensued; thus, if the decedent's negligence was not as great as that of the defendants, then decedent's heirs would be entitled to recover for their loss reduced by the percentage of decedent's negligence; however, where the decedent's negligence is equal to or greater than the defendant's negligence, then the decedent's heirs are barred from recovery as would be the injured party had he survived. Bevan v. Vassar Farms, Inc., 117

Idaho 1038, 793 P.2d 711 (1990).

A trial court did not err when it aggregated the negligence of deceased daughter with that of her parents, in their wrongful death action against the manufacturer of a go-cart, and the court properly barred the parents' recovery where the aggregated negligence was 50 percent. Woodburn v. Manco Prods., Inc., 137 Idaho 502, 50 P.3d 997 (2002).

Heirs.

"Heirs" in the context of this section refers to persons who are entitled to inherit the property of an intestate, according to the laws of intestate succession in effect as of the date of death. Schiess v. Bates, 107 Idaho 794, 693 P.2d 440 (1984).

Heirs are determined at the date of death for purposes of this section, and the later execution of a renunciation document by a widow renouncing inheritance of her husband's one-half of the community to her children does not alter that fact. Schiess v. Bates, 107 Idaho 794, 693 P.2d 440 (1984).

In General.

Idaho law allows a wrongful death action to be brought if the decedent could have maintained an action had he lived. Stevens v. Fleming, 116 Idaho 523, 777 P.2d 1196 (1989).

Pain and Suffering.

An action for pain and suffering does not survive the death of the injured party, and § 32-906 does not provide that pain and suffering is community property rather than the separate property of the injured spouse. Evans v. Twin Falls County, 118 Idaho 210, 796 P.2d 87 (1990), cert. denied, 498 U.S. 1086, 111 S. Ct. 960, 112 L. Ed. 2d 1048 (1991).

Purpose.

A wrongful death action is allowed upon the theory that the wrongful death of the ancestor works a personal injury to his heirs, in that it deprives them of some pecuniary or other benefit which they would have received except for the death of the ancestor. Bevan v. Vassar Farms, Inc., 117 Idaho 1038, 793 P.2d 711 (1990).

Retroactivity.

The 1984 revision to this section, which for the first time enacted a statutory definition of "heirs" as used in the wrongful death statute, is not retroactive in application. Nebeker v. Piper Aircraft Corp., 113 Idaho 609, 747 P.2d 18 (1987).

Rights of Heirs.

If a defendant would not be liable for injuries to the decedent had death not ensued, then there is no basis for recovery by the decedent's heirs; therefore, if a defendant's conduct does not make him liable to an injured party, then that defendant cannot be held liable in the event of death for damages resulting from the same conduct; thus, there was no basis for recovery of damages by the heirs of decedent where 50 percent of the negligence was apportioned to decedent. Bevan v. Vassar Farms, Inc., 117 Idaho 1038, 793 P.2d 711 (1990).

It is reasonable, in a wrongful death action, to bar the heirs' recovery against a defendant if the deceased himself could not recover. Bevan v. Vassar Farms, Inc., 117 Idaho 1038, 793 P.2d 711 (1990).

Standing.

Subsection (1) of this section is construed to use "personal representative" to mean the personal representative of the decedent, not of the heirs; thus, an action may be maintained for wrongful death of a person by the decedent's heirs or the decedent's personal representative on behalf of the heirs. Hagy v. State, 137 Idaho 618, 51 P.3d 432 (Ct. App. 2002).

In a wrongful death case, an older brother to the decedents fell within the definition of an "heir," under subsection (2)(b), provided the older brother was partly or wholly dependent on the decedents for support or services; however, that support did not extend to the emotional and social support that the older brother claimed as damages, and the older brother did not have standing to recover. O'Guin v. Bingham County, 139 Idaho 9, 72 P.3d 849 (2003).

Unborn Child.

Under this section, viability marks the beginning of legal personhood, and the right to assert a cause of action for the wrongful death of a fetus is correspondingly limited to cases involving the death of a viable fetus. Santana v. Zilog, Inc., 878 F. Supp. 1373 (D. Idaho 1995), aff'd, 95 F.3d 780 (9th Cir. 1996).

Idaho's wrongful death statute did not support a cause of action for six nonviable fetuses worker miscarried while working at place of employment. Santana v. Zilog, Inc., 95 F.3d 780 (9th Cir. 1996).

Cited in: Blake v. Cruz, 108 Idaho 253, 698 P.2d 315 (1984); Black v. Reynolds, 109 Idaho 277, 707 P.2d 388 (1985); Waters v. Armstrong World Indus., Inc., 773 F.2d 248 (9th Cir. 1985); Jenkins v. Armstrong World Indus., Inc., 643 F. Supp. 17 (D. Idaho 1985); Sawyer v. Claar, 115 Idaho 322, 766 P.2d 792 (Ct. App. 1988); Muniz v. Schrader, 115 Idaho 391, 767 P.2d 1272 (Ct. App. 1989); Estate of Shaw v. Dauphin Graphic Machs., Inc., 392 F. Supp. 2d 1230 (D. Idaho 2005); Craig v. Gellings, — Idaho —, 219 P.3d 1208 (Ct. App. 2009).

DECISIONS UNDER PRIOR LAW

ANALYSIS

Bar to Action.

The United States was not an "employer" within the meaning of the workmen's [now worker's] compensation act (see § 72-101 et seq.) so as to bar an action under former similar section where a workman of the general contractors for a flood control project for the United States fell from a scaffold, and exemption of an "employer" from common law or statutory action for negligence did not apply. Kirk v. United States, 232 F.2d 763 (9th Cir. 1956).

Constitutionality.

This section created a new cause of action in favor of those who stand in greatest need of recovery, i.e., the decedent's "heirs." This legislative limitation on the number of plaintiffs who may bring an action is a reasonable exercise of legislative authority and bears a rational relationship to a legitimate state objective and, therefore, is not violative of the equal protection provisions of either Idaho Const., art. 1, § 13 or the United States Constitution. Nebeker v. Piper Aircraft Corp., 113 Idaho 609, 747 P.2d 18 (1987).

Construction.

In case the injury results in death, the heirs of deceased can recover only in case decedent could have recovered damages had he not been killed, but only injured. Northern Pac. Ry. v. Adams, 192 U.S. 440, 24 S. Ct. 408, 48 L. Ed. 513 (1904).

The construction of former similar statute by the Supreme Court of Idaho, with respect to the nature of the right of action created, is in accord with the accepted view of statutes similar to Lord Campbell's act; the recovery is not for the benefit of the "estate" of the decedent; the heirs are the only beneficiaries and are not represented by the administratrix in a suit brought without their consent. Spokane & I.E.R.R. v. Whitley, 237 U.S. 487, 35 S. Ct. 655, 59 L. Ed. 1060 (1915).

The word "heirs" means such heirs as are entitled to inherit from deceased persons, under the statutes of descent and distribution. Little v. Ireland, 30 F. Supp. 653 (D. Idaho 1939); Whitley v. Spokane & I.E.R.R., 23 Idaho 642, 132 P. 121 (1913), aff'd, 237 U.S. 487, 35 S. Ct. 655, 59 L. Ed. 1060 (1915).

Where there are no heirs, the action cannot be maintained and any judgment obtained in such an action inures to the benefit of the "heirs" of the decedent, and in no case becomes a part of the assets of the estate of the deceased. Whitley v. Spokane & I.E.R.R., 23 Idaho 642, 132 P. 121 (1913), aff'd, 237 U.S. 487, 35 S. Ct. 655, 59 L. Ed. 1060 (1915).

Former similar section was construed to have the same force and effect as if it had expressly provided that those claiming under decedent may recover only when the act would have entitled the person injured to recover had death not ensued. Helgeson v. Powell, 54 Idaho 667, 34 P.2d 957 (1934).

The right to recover for a death caused by the wrongful act or negligence of another is statutory. Hepp v. Ader, 64 Idaho 240, 130 P.2d 859 (1942).

The action created by former similar section is not a survival action, but an action, the right to prosecute which did not accrue in the lifetime of decedent but only upon her death;

hence, in the case of the deceased being a married woman, contention that an action in tort can not be maintained by a wife against her husband need not be considered. Russell v. Cox, 65 Idaho 534, 148 P.2d 221 (1944).

The cause of action which accrues to the injured party during his lifetime may be prosecuted or compromised by the injured party and the receipts inure to the benefit of his estate; whereas the right of action which accrues on the death of the injured party can only be prosecuted by her heirs or personal representatives and does not benefit the estate. Russell v. Cox, 65 Idaho 534, 148 P.2d 221 (1944).

Former similar statute created a new right of action with a different measure of damages from anything known at common law. Hughes v. Hudelson, 67 Idaho 10, 169 P.2d 712 (1946).

Contributory Negligence.

"Last clear chance" doctrine applied. Short v. Boise Valley Traction Co., 38 Idaho 593, 225 P. 398 (1924).

In action by husband against physician for malpractice resulting in death of wife, plaintiff's contributory negligence in not notifying defendant immediately of marked change in deceased's condition is a defense. Sprouse v. Magee, 46 Idaho 622, 269 P. 993 (1928).

The contributory negligence of a deceased is a bar to recovery in an action for his wrongful death. Clark v. Foster, 87 Idaho 134, 391 P.2d 853 (1964).

The contributory negligence of a father in the death of the children's mother does not bar the children from recovering for her wrongful death. Clark v. Foster, 87 Idaho 134, 391 P.2d 853 (1964).

Damages in General.

The expression "as under the circumstances of the case, may be just" means such circumstances as are properly shown to the jury by the evidence under the pleadings, and the jury should be so instructed; the jury should not be permitted to assess damages on their own ideas and notions of what the "circumstances of the case" are, regardless of the pleadings and proof. Holt v. Spokane & Inland Empire R.R., 3 Idaho 703, 35 P. 39 (1893).

It is not error for the court to instruct the jury that in considering the amount of pecuniary damages sustained by the plaintiff they may take into consideration "the degree of intimacy existing between the father and the child and the loss of companionship if such be shown"; moreover the jury is not limited to a precise and specific pecuniary amount measured by the direct evidence given in the case, but are at liberty to take into consideration, guided by the evidence given in the case, the intrinsic probabilities that damages have been sustained by and on account of the loss of bodily care or intellectual culture or moral training which the parent of the deceased had previously supplied or bestowed. Anderson v. Great N.R.R., 15 Idaho 513, 99 P. 91 (1908).

In an action by father for the wrongful death of a son seven years of age, caused by collision on the railway, where it is admitted that the death occurred through the negligence and carelessness of the servants of the defendant, the value of the child's services to the father during the period of his minority should be ascertained by the jury from the evidence introduced and by using their own judgment, common sense and discretion, as an estimate of such services must, of necessity, to a considerable extent be a matter of opinion. Golden v. Spokane & Inland Empire R.R., 20 Idaho 526, 118 P. 1076 (1911).

If it be shown heirs have suffered injury in loss of companionship of deceased, such loss may be considered by jury, even though heirs are not relatives in direct line. Kelly v. Lemhi Irrigation & Orchard Co., 30 Idaho 778, 168 P. 1076 (1917).

Recovery can be had for medical and funeral expenses which have been paid by the beneficiaries, or for which they are liable, provided reasonable value thereof is shown, and provided it appears that the amounts charged are reasonable. Jutila v. Frye, 8 F.2d 608 (9th Cir. 1925).

While damages may not be allowed for mental suffering or as solatium for wounded feelings, they may be allowed for loss of companionship, protection, bodily care, intellectual culture or moral training provided it sufficiently appears that pecuniary damages resulted from such loss. Wyland v. Twin Falls Canal Co., 48 Idaho 789, 285 P. 676 (1930).

In parents' action for death of adult daughter, jury must estimate damages as best they can by reasonable probabilities, under circumstances. Butler v. Townsend, 50 Idaho 542, 298 P. 375 (1931).

Under former similar statute, a recovery could not be had for grief and anguish of survivors, but a loss for society, companionship, comfort, protection, guidance, advice, and intellectual training may be recovered. Hepp v. Ader, 64 Idaho 240, 130 P.2d 859 (1942).

In an action for death, it is the duty of the jury to fix the amount of damages to be awarded. Hepp v. Ader, 64 Idaho 240, 130 P.2d 859 (1942).

The Supreme Court will disturb the amount of damages fixed by jury only in case of abuse of discretion on the part of the jury when such is clearly apparent. Hepp v. Ader, 64 Idaho 240, 130 P.2d 859 (1942).

Elements entering into the determination of damages for death of a child include: contributions which the parents might reasonably have expected to receive from the earnings of the deceased during his minority; and

comfort, society and companionship deceased would have afforded to them had he lived; but grief and anguish are not to be considered. Checketts v. Bowman, 70 Idaho 463, 220 P.2d 682 (1950), overruled in part, Meissner v. Smith, 94 Idaho 563, 494 P.2d 567 (1972).

In a wrongful death action filed in Idaho arising out of an accident in Oregon, the amount of recovery was governed by the Oregon statute. Barnes v. Union Pac. R.R., 139 F. Supp. 198 (D. Idaho 1956).

Where the trial judge did not abuse his discretion in refusing to interfere with a jury's award of $60,000 in a wrongful death case and where no excess appeared as a matter of law, the refusal of the trial judge to reduce the award or grant a new trial on damages was not open to review. Union Pac. R.R. v. Jarrett, 381 F.2d 597 (9th Cir. 1967).

The classification in § 5-327, entitling those suing the tortfeasor to recover full damages awarded by the trier of fact and limiting the damages to $10,000 for those suing the tortfeasor's representative, was not in conflict with equal protection clause. Stucki v. Loveland, 94 Idaho 621, 495 P.2d 571 (1972) (decision prior to 1971 amendment of § 5-327).

An award of $35,000 for the wrongful death of an eleven-year-old minor child was not excessive as a matter of law. Kinney v. Smith, 95 Idaho 328, 508 P.2d 1234 (1973).

A survival action is for the damages the deceased suffered and could have sued for had he survived, while a wrongful death action, in contrast, involves the damages suffered by the heirs of the decedent because of his death. Gavica v. Hanson, 101 Idaho 58, 608 P.2d 861 (1980), overruled in part, Sterling v. Bloom, 111 Idaho 211, 723 P.2d 755 (1986).

Damages in Particular Cases.

Recovery of $1,500 by a husband for the death of his wife was not excessive. Jutila v. Frye, 8 F.2d 608 (9th Cir. 1925).

Damages of $5,000 and expenses caused by injury to son 18 years of age resulting in his death was not excessive. Shaddy v. Daley, 58 Idaho 536, 76 P.2d 279 (1937).

Jury was justified in awarding $15,000 general damages, and funeral expenses, in suit by widow and children. Manion v. Waybright, 59 Idaho 643, 86 P.2d 181 (1938).

Award of $23,535 for the father of three minor children, where the father had thirty-one and seven-tenths (31 7/10) years' expectancy of life, was able-bodied, industrious, and thirty-six and a half (36 1/2) years old, and earned $0.55 an hour, was not excessive for his death. Lebak v. Nelson, 62 Idaho 96, 107 P.2d 1054 (1940).

A verdict of $10,000 to the husband for the wrongful death of a 54-year-old wife, who had been so crippled by rheumatism that she was unable to walk, work, or dress herself, is not excessive. Hepp v. Ader, 64 Idaho 240, 130 P.2d 859 (1942).

Defenses Precluding Recovery.

In suit by widow and children of deceased construction worker who was killed when he fell during construction of Lucky Peak Dam on Boise River, his failure to fasten his safety belt, which would have precluded his recovery had he not been killed, precluded recovery for his death by his heirs. Kirk v. United States, 161 F. Supp. 722 (D. Idaho 1958), aff'd, 270 F.2d 110 (9th Cir 1959).

An heir cannot recover under the Idaho Wrongful Death Statute, unless the deceased himself could have recovered had he not been killed. Kirk v. United States, 161 F. Supp. 722 (D. Idaho 1958), aff'd, 270 F.2d 110 (9th Cir 1959).

In a wrongful death action in which plaintiffs alleged that their son died as a result of the reckless and negligent conduct of defendant, who had engaged the decedent to descend into a drill shaft to make repairs to broken equipment, the trial court correctly instructed the jury that the plaintiffs could not recover damages unless the decedent could have recovered for his injuries had he survived. Anderson v. Gailey, 97 Idaho 813, 555 P.2d 144 (1976).

Equal Protection.

Because the right to recover for wrongful death is not a fundamental right, a classification scheme imposed under a wrongful death statute must merely be shown to bear some rational relationship to a permissible state objective in order to meet equal protection requirements. Everett v. Trunnell, 105 Idaho 787, 673 P.2d 387 (1983).

The state objective under the wrongful death statute was to change the common law to allow recovery for wrongful death, while at the same time limiting that recovery to those persons most likely to suffer a loss such as a surviving wife and child; this limitation on the statutory cause of action is reasonable and bears a rational relationship to a legitimate state objective. Accordingly, parents who were denied right to sue for wrongful death of son were not denied equal protection of the laws. Everett v. Trunnell, 105 Idaho 787, 673 P.2d 387 (1983).

Free Passenger on Railroad Train.

The death of a free passenger on a railway train, not due to omission on the part of the railroad of any duty owing to the deceased, is not "wrongful" or "negligent" within the meaning of this section and does not authorize an action by the heirs against the railroad. Northern Pac. Ry. v. Adams, 192 U.S. 440, 24 S. Ct. 408, 48 L. Ed. 513 (1904).

Heirs.

The right of children to bring wrongful death actions before the adoption in 1971 of the Uniform Probate Code was based on their right to succeed to the decedent's estate under the laws of intestate succession in effect as of the date of death. The legislature, in enacting the Uniform Probate Code, intended that the wrongful death statute be applied in the same manner as it always had been, that is "heirs" would be determined by reference to the intestate succession provision in effect at the time of death. Nebeker v. Piper Aircraft Corp., 113 Idaho 609, 747 P.2d 18 (1987).

The term "heirs," as used in this section as it read prior to the revision in 1984, is defined to mean those who would take under the intestate provisions of the probate code in effect at the time of the decedent's death. Nebeker v. Piper Aircraft Corp., 113 Idaho 609, 747 P.2d 18 (1987).

In General.

Statutes authorizing actions for wrongful death are remedial in nature, designed to alleviate the harsh rule of common law that if an injured person died, his cause of action ceased to exist. Volk v. Baldazo, 103 Idaho 570, 651 P.2d 11 (1982).

The right of a person to recover for the wrongful death of another is statutory, and a person seeking to recover must qualify under the statute. Everett v. Trunnell, 105 Idaho 787, 673 P.2d 387 (1983).

Pain and Suffering.

Since pain and suffering are personal to the deceased and are not damages suffered by the survivors, an action for pain and suffering under this section does not survive death. Vulk v. Haley, 112 Idaho 855, 736 P.2d 1309 (1987).

Parents of Minor Child.

In action by parents to recover damages for injury to minor child, amount of damages recovered depends on the circumstances of the case and what is just. Hayward v. Yost, 72 Idaho 415, 242 P.2d 971 (1952).

Parties Defendant.

A railroad corporation is liable for damages to employee injured through the negligence of its agents or servants who are invested with a controlling and superior duty in the management of the business of the corporation. Palmer v. Utah & N.R.R., 2 Idaho 315, 13 P. 425 (1887).

Where, at the time of the accident driver of automobile was neither an agent, employee nor servant of a specific company, but was merely driving toward a town in an effort to report for work and the use and operation of his automobile in that effort was entirely his choice and under his complete control, he was not a person employed by another person who was responsible for his conduct within the wrongful death statute; a prospective employer is not liable for any negligence on the part of such driver in the operation of his car while driving toward the place of intended employment. Lallatin v. Terry, 81 Idaho 238, 340 P.2d 112 (1959).

Parties Plaintiff.

Guardians of minor children of deceased employee have right to maintain action against third person. Workmen's Comp. Exch. v. Chicago, M., St. P. & Pac. R.R., 45 F.2d 885 (D. Idaho 1930).

The fact that the wife predeceased the husband did not preclude a daughter as wife's "heir" from recovering for wife's death, under this section, on the theory that immediately on the wife's death, the right of action was given to the husband, under the community property laws, and that such right of action was completely extinguished by the husband's subsequent death. Little v. Ireland, 30 F. Supp. 653 (D. Idaho 1939).

A 33-year-old daughter was not entitled to recover damages for the death of her 54-year-old mother, for whose death the father had recovered $10,000, where the daughter was married, lived with her own family, and there was no showing of a single visit by the daughter at the maternal home or of the relation existing between the daughter and the mother. Hepp v. Ader, 64 Idaho 240, 130 P.2d 859 (1942).

Where mother and husband were the only heirs of deceased, who was killed by husband, the mother was entitled to prosecute the action under this section. Russell v. Cox, 65 Idaho 534, 148 P.2d 221 (1944).

A foreign administratrix cannot bring a wrongful death action in Idaho, since only residents of the state can serve as administrator or administratrix in Idaho. Barnes v. Union Pac. R.R., 139 F. Supp. 198 (D. Idaho 1956).

As the Idaho death statute is a new right of action to a designated class of persons, i.e., the decedent's heirs or personal representatives, the determination of who must bring the action depends upon substantive law and in a diversity action in federal district court the determination whether a third person was an indispensable party plaintiff to such action would have to be determined by the law of Idaho. Campbell v. Pacific Fruit Express Co., 148 F. Supp. 209 (D. Idaho 1957).

Since the right of action is not given to the decedent's estate, but is granted only to his heirs, denial to executor of right of recovery was not a deprival of equal protection of the law. Moon v. Bullock, 65 Idaho 594, 151 P.2d 765 (1944), overruled on other grounds, Doggett v. Boiler Eng'r & Supply Co., 93 Idaho

890, 477 P.2d 511 (1970).

Where the twenty-year-old decedent was an adult under the 1972 probate law, his wife and minor child were the proper parties to bring suit under this section. Harrigfeld v. District Court of Seventh Judicial Dist., 95 Idaho 540, 511 P.2d 822 (1973).

Only those who qualify as "heirs" under the intestate succession statute are proper parties plaintiff in wrongful death actions under this section. Nebeker v. Piper Aircraft Corp., 113 Idaho 609, 747 P.2d 18 (1987).

Pleading, Proof, Practice.

A complaint under former similar statute was not obnoxious to a general demurrer because it failed to show whether the deceased was a minor or a major. Palmer v. Utah & N.R.R., 2 Idaho 315, 13 P. 425 (1887).

It is not necessary for husband, wife, parent or child to plead or prove damages arising from the loss of services, food, clothing, shelter, or anything else which may be measured in dollars and cents, in an action for wrongful death of a spouse, a parent, or a child. Hepp v. Ader, 64 Idaho 240, 130 P.2d 859 (1942).

Where the complaint did not allege that husband suing for death of his wife, was her sole heir, and objection on that ground was not interposed by motion, demurrer, or answer, it is waived. Jutila v. Frye, 8 F.2d 608 (9th Cir. 1925).

The cause of action arises out of the same state of facts, whether prosecuted by the injured party during his lifetime or by his heirs after his death; but the heirs must prove the additional fact that the decedent died as a result of the wrongful or negligent act. Russell v. Cox, 65 Idaho 534, 148 P.2d 221 (1944).

In action to recover for the death of another caused by accident, the usual rule of preponderance of evidence prevails. Hughes v. Hudelson, 67 Idaho 10, 169 P.2d 712 (1946).

In action to recover for death of guest passenger the question of whether the driving of owner was reckless is for jury. Hughes v. Hudelson, 67 Idaho 10, 169 P.2d 712 (1946).

In a wrongful death action against automobile dealer and automobile manufacturer based on alleged defects in automobile, the plaintiffs were required to prove that one or both of the defendants were guilty of tortious conduct, and allegations of implied warranties were not pertinent, but facts relating to the sale were pertinent. Sugai v. GMC, 130 F. Supp. 101 (D. Idaho 1955).

Punitive Damages.

The statutory language "such damages may be given as under all the circumstances of the case may be just" permits proof and allowance of punitive damages. Gavica v. Hanson, 101 Idaho 58, 608 P.2d 861 (1980), overruled in part, Sterling v. Bloom, 111 Idaho 211, 723 P.2d 755 (1986).

Settlement Not Including Nonparty Heirs.

Where defendants in wrongful death action under this section voluntarily settled with plaintiff-husband of decedent with full knowledge of the existence of parents of decedent as other nonparty heirs, defendants waived the right to insist upon a single action joined in by all the heirs, and parents could still maintain action. Hogan v. Hermann, 101 Idaho 893, 623 P.2d 900 (1980).

Settlement Not in Trust for Later Claimant.

Where defendants in wrongful death action under this section settled claim of decedent's husband with full knowledge of nonparty potential claimants and where release and cover letter specified that only husband's claim was being settled, husband's personal settlement recovery is not held in express or implied trust for the benefit of claimants who file later wrongful death action. Hogan v. Hermann, 101 Idaho 893, 623 P.2d 900 (1980).

Statute of Limitations.

The "occurrence, act or omission" which § 5-219 defines as the accrual of a cause of action for wrongful death refers to the death of the person, caused by the wrongful acts of another, and the running of the statute of limitations on the wrongful death cause of action begins from the date of death. Chapman v. Cardiac Pacemakers, Inc., 105 Idaho 785, 673 P.2d 385 (1983).

Type of Action.

The actions authorized by § 5-310 and this section are not actions arising for the surviving rights of a decedent, but rather are compensatory and enacted for the benefit of the named survivors. Vulk v. Haley, 112 Idaho 855, 736 P.2d 1309 (1987).

Worker's Compensation.

Workmen's [now worker's] compensation law (see § 72-101 et seq.) withdrawing all phases of workmen's [now worker's] compensation cases from private controversy precluded parents from recovering under this section from deceased son's employer, notwithstanding they could not recover workmen's [now worker's] compensation because they were not "dependents" within the meaning of the workmen's [now worker's] compensation law. Stample v. Idaho Power Co., 92 Idaho 763, 450 P.2d 610 (1969).

RESEARCH REFERENCES

Am. Jur. — 22A Am. Jur. 2d, Death, §§ 78 to 132.

C.J.S. — 25A C.J.S., Death, §§ 46 to 75.

A.L.R. — Res ipsa loquitur with respect to personal injuries or death on or about ship. 1 A.L.R.3d 642.

Hospital's liability for personal injury or death of doctor, nurse, or attendant. 1 A.L.R.3d 1036.

Liability of social club for injury to death of nonmember. 15 A.L.R.3d 1013.

Master's liability for injury to or death of person, or damage to property, resulting from fire allegedly caused by servant's smoking. 20 A.L.R.3d 893.

Liability of owner of private residential swimming pool for injury or death occasioned thereby. 20 A.L.R.3d 1395.

Owner's or keeper's liability for personal injury or death inflicted by wild animal. 21 A.L.R.3d 603; 92 A.L.R.3d 832; 66 A.L.R. Fed. 305.

Right to maintain direct action against fellow employee for injury or death covered by workmen's compensation. 21 A.L.R.3d 845; 57 A.L.R.4th 888.

Uninsured motorist clause; coverage of claim for wrongful death of insured. 26 A.L.R.3d 935.

Brothers and sisters of deceased as beneficiaries within state wrongful death statute. 31 A.L.R.3d 379.

Right of action for injury to or death of woman who consented to illegal abortion. 36 A.L.R.3d 630.

Liability of prison authorities for injury to prisoner directly caused by assault by other prisoner. 41 A.L.R.3d 1021.

Druggist's civil liability for suicide consummated with drugs furnished by him. 58 A.L.R.3d 828.

Action for death of stepparent by or for benefit of stepchild. 68 A.L.R.3d 1220.

Remarriage of surviving parent as affecting action for wrongful death of child. 69 A.L.R.3d 1038.

Right to amend pending personal injury action by including action for wrongful death after statute of limitations has run against independent death action. 71 A.L.R.3d 933.

Civil liability of prison or jail authorities for self-inflicted injury or death of prisoner. 79 A.L.R.3d 1210.

Minority of surviving children as tolling limitation period in state wrongful death action. 85 A.L.R.3d 162.

Governmental liability from operation of zoo. 92 A.L.R.3d 832.

Assignability of proceeds of claim for personal injury or death. 33 A.L.R.4th 82.

Willful, wanton, or reckless conduct of coemployee as ground of liability despite bar of workers' compensation law. 57 A.L.R.4th 888.

Who, other than parent, may recover for loss of consortium on death of minor child. 84 A.L.R.5th 687.

5-312 — 5-318. Joinder of parties — Unity of interest — Nonconsenting parties — Several liability — Co-tenants. [Repealed.]

STATUTORY NOTES

Compiler's Notes.

These sections, which comprised C.C.P. 1881, §§ 193 — 199; R.S., R.C., & C.L., §§ 4101 — 4107; C.S., §§ 6645 — 6651; I.C.A., §§ 5-312 — 5-318 were repealed by S.L. 1975, ch. 242, § 1, effective March 31, 1975. For present rule, see Idaho Civil Procedure Rules 19(a) and 20(a).

5-319. Death or transfer of interest — Procedure — Actions by or against public officers. — An action or proceeding does not abate by the death or any disability of a party, or by the transfer of any interest therein, if the cause of action or proceeding survive or continue. In case of the death or any disability of a party, the court, on motion, may allow the action or proceeding to be continued by or against his representative or successor in interest. In case of any other transfer of interest the action or proceeding may be continued in the name of the original party, or the court may allow the person to whom the transfer is made to be substituted in the action or proceeding. An action or proceeding brought by or against any public officer in his official capacity and which action or proceeding is pending at the time

of his death, resignation, retirement or removal from office does not abate. The court on its own motion or on motion for substitution may substitute the successor in office and allow the action or proceeding to be continued against such successor.

History.
C.C.P. 1881, § 200; R.S., R.C., & C.L., § 4108; C.S., § 6652; am. 1931, ch. 96, § 1, p. 169; I.C.A., § 5-319.

STATUTORY NOTES

Cross References.
Action to recover land does not abate by transfer of defendant's interest, § 6-409.
In case of death of defendant pending suit the claim must be presented to the executor or administrator, § 15-3-803.
Judgment after death, § 10-1106.
Personal injuries, death of wrongdoer, survival of action, § 5-327.

JUDICIAL DECISIONS

Analysis

Actions against public officers.
Divorce.
Quiet title suit.
Road districts.
Substitution of new party.
Substitution of personal representative.
Survival or abatement.
Transferee as "real party in interest."

Actions Against Public Officers.
Action to remove a justice of the peace for failure to perform certain duties did not survive death of such officer. Dygert v. Harrison, 34 Idaho 377, 201 P. 719 (1921).

In mandamus to compel district judge to vacate certain orders, and in prohibition to restrain him from proceeding in the case, his successor in office cannot be substituted. Boise-Kuna Irrigation Dist. v. Hartson, 48 Idaho 572, 285 P. 456 (1929).

Whether, as a matter of right, a successor in office may be substituted for his predecessor as a party to an appeal to the supreme court in a mandamus proceeding was not decided; but where substituted was granted since no objection was made and no substantial right violated, court upheld such substitution. Independent Sch. Dist. No. 2 v. Butler, 53 Idaho 187, 22 P.2d 685 (1933).

Where the action is against a board or other body having a continuing existence, even where there is no statute providing for survivorship and substitution, the action will not abate because of change in personnel. Doolittle v. Eckert, 53 Idaho 384, 24 P.2d 36 (1933).

Divorce.
In a divorce action involving property rights where division was made by the trial court of the property and an appeal was taken from the judgment, it is not abated by the death of the respondent husband. Milbourn v. Milbourn, 86 Idaho 213, 384 P.2d 476 (1963).

Quiet Title Suit.
Heirs of plaintiff, plaintiff having died during pendency of suit to quiet title, were not required to be joined as parties on substitution of administrator as plaintiff, notwithstanding that the heirs might have been substituted alone or jointly with the administrator. Bruun v. Hanson, 103 F.2d 685 (9th Cir.), cert. denied, 308 U.S. 571, 60 S. Ct. 86, 84 L. Ed. 479 (1939).

A decree of court quieting title in a suit commenced by decedent during his lifetime, wherein his administrator was substituted on his death, was not subject to collateral attack by the heirs of the decedent who were not joined in the quiet title action; the ground of the attack being that the parties in the suit to quiet title were different than those in the action in which the heirs attempted to attack the decree, since, although the heirs might have been substituted to quiet title, they were not required to be made parties. Bruun v. Hanson, 103 F.2d 685 (9th Cir.), cert. denied, 308 U.S. 571, 60 S. Ct. 86, 84 L. Ed. 479 (1939).

In a suit by heirs against administrator and his attorney to set up a trust in mining claims, title to which had been quieted in defendants in a suit instituted by decedent wherein the administrator was substituted as

plaintiff, a decree quieting title in such an action was not subject to collateral attack on the ground of fraud, in the absence of pleading or proof showing that the administrator and his attorney colluded with defendants in the suit to quiet title to obtain for themselves all of or an interest in the property to be quieted in defendants, or that the attorney and administrator did obtain such an interest. Bruun v. Hanson, 103 F.2d 685 (9th Cir.), cert. denied, 308 U.S. 571, 60 S. Ct. 86, 84 L. Ed. 479 (1939).

Road Districts.

In an action by a road district against a county to compel an apportionment of taxes, plaintiff district was entitled to be substituted for another district which covered the same territory and for which no taxes had ever been levied and which had never voted any improvement bonds. Good Road Dist. No. 2 v. Washington County, 27 Idaho 732, 152 P. 183 (1915).

Substitution of New Party.

Motion and order for substitution of new party are necessary before proceeding in action. Holter v. Hauser, 33 Idaho 406, 195 P. 628 (1921).

New corporation claiming to have succeeded to rights and powers of one defunct must secure order of substitution before attempting appeal in name of its predecessor. Holter v. Hauser, 33 Idaho 406, 195 P. 628 (1921).

Orders substituting as litigants successors in interest of parties to the action cannot be made ex parte; it must be procured on motion after notice to the opposing party. Withington v. Erickson, 57 Idaho 53, 63 P.2d 150 (1936).

Supreme court, in appeal from order of trial court upholding validity of election of bank directors, granted a motion to substitute successors in interest to director who had resigned pending appeal though permitting resigned director to remain as a nominal plaintiff. Doolittle v. Morley, 76 Idaho 138, 278 P.2d 998 (1955).

Substitution of Personal Representative.

Court order of substitution is not necessary under this section to enable administrator to carry on his intestate's litigation by appeal. Oatman v. Hampton, 43 Idaho 675, 256 P. 529 (1927); Hanson v. Rogers, 54 Idaho 360, 32 P.2d 126 (1934).

The action cannot be continued in the name of the deceased in behalf of his heirs without substitution of a representative or successor in interest of deceased. Arthur v. Kilpatrick Bros. Co., 47 Idaho 306, 274 P. 800 (1929).

If nonresident decedent is plaintiff in pending action which survives death, probate court may appoint administrator; but where he is defendant, there is no res for administration, precluding administrator. Russell v. Bow, 50 Idaho 264, 295 P. 437 (1931).

Court judicially notices that nonresident decedent, being defendant in pending action which survived death, had filed counter claim, justifying appointment of administrator; there being res for administration. Russell v. Bow, 50 Idaho 264, 295 P. 437 (1931).

Where one of defendants in proceeding by ditch company to enjoin obstruction of ditch died, the supreme court vacated the setting and continued case and executor was substituted by motion and the case reset for argument. Lower Payette Ditch Co. v. Smith, 73 Idaho 514, 254 P.2d 417 (1953).

Although a claimant's cause of action was abated by his death because he did not have a surviving spouse, the appellate court did not dismiss the appeal, because the trial court had improperly dismissed the case and the personal representative should be given the opportunity to file an amended complaint for wrongful death without having to file a new lawsuit. Steele v. Kootenai Med. Ctr., 142 Idaho 919, 136 P.3d 905 (2006).

Survival or Abatement.

Injuries of personal nature which do not survive are such as injury to person, malicious prosecution, false imprisonment, libel, slander and the like; but injury which lessens estate of injured party does survive and is thus assignable. MacLeod v. Stelle, 43 Idaho 64, 249 P. 254 (1926).

This is not a general survival statute, and it is still recognized that certain actions die irretrievably with the death of a party. Moon v. Bullock, 65 Idaho 594, 151 P.2d 765 (1944), overruled on other grounds, Doggett v. Boiler Eng'r & Supply Co., 93 Idaho 890, 477 P.2d 511 (1970).

Transferee as "Real Party in Interest."

Where the plaintiff transferred the land and water rights by absolute deed during the pendency of an action to quiet the title to water rights, and no application was made that the real party in interest be made a party to the action and the plaintiff objected to the transferee being made a party, the plaintiff was not, under these circumstances, the "real party in interest" and was not entitled to maintain the action, notwithstanding the fact that the conveyance may have been made without consideration. Carrington v. Crandall, 63 Idaho 651, 124 P.2d 914 (1942).

Cited in: Rayhurst v. Boyd Hosp., 38 Idaho 633, 224 P. 78 (1924); Gowey v. Siggelkow, 85 Idaho 574, 382 P.2d 764 (1963); Calkins v. May, 97 Idaho 402, 545 P.2d 1008 (1976); Estate of Shaw v. Dauphin Graphic Machs., Inc., 392 F. Supp. 2d 1230 (D. Idaho 2005).

RESEARCH REFERENCES

C.J.S. — 1 C.J.S., Abatement and Revival, § 93 et seq.

A.L.R. — Death of putative father as precluding action for determination of paternity or for child support. 58 A.L.R.3d 188.

Effect of death of beneficiary upon right of action under death statute. 13 A.L.R.4th 1060; 73 A.L.R.4th 441.

Claim for punitive damages in tort action as surviving death of tortfeasor or person wronged. 30 A.L.R.4th 707.

Abatement of state criminal case by accused's death pending appeal of conviction — Modern cases. 80 A.L.R.4th 189.

Abatement effects of accused's death before appellate review of federal criminal conviction. 80 A.L.R. Fed. 446.

5-320. Substitution of defendant. [Repealed.]

STATUTORY NOTES

Compiler's Notes.

This section, which comprised C.C.P. 1881, § 201; R.S., R.C., & C.L., § 4109; C.S., § 6653; I.C.A., § 5-320, was repealed by S.L. 1975, ch. 242, § 1, effective March 31, 1975. For present rule, see Idaho Civil Procedure Rules 14(a), 22.

5-321. Interpleader. — In an action commenced by a person possessing specific personal property which is claimed by two (2) or more persons to determine to which the property should be delivered, or in an action for the recovery of specific personal property where a third person demands of the defendant the same property, the court in its discretion, on motion of the person possessing the property, and notice to the persons claiming the property, whether or not they are parties to the action, may, before answer, make an order discharging the person possessing the property from liability to claiming persons and interplead such claiming person or persons in the action. The order shall not be made except on the condition that the person possessing the property shall deliver the property or its value to the clerk of the court or to such custodian as the court may direct, and unless it appears from the affidavit of the person possessing the property, filed with the clerk with the motion, that such person or persons claiming makes or make such demand without collusion with the party possessing the property. The affidavit of such third person as to whether he makes such demand of the defendant may be read on the hearing of the motion.

A person possessing the property who follows the procedure set forth above may insert in his motion for interpleader a request for allowance of his costs and reasonable attorney fees incurred in such action. In ordering the discharge of such party, the court may, in its discretion, award such party his costs and reasonable attorney fees from the amount in dispute which has been deposited with the court. At the time of final judgment in the action, the court may make such further provision for assumption of such costs and attorney fees by one (1) or more of the adverse claimants. At the same time, the court may, in its discretion, award to the person determined to be entitled to the property his costs and reasonable attorneys' fees against an unsuccessful claimant if the claim asserted by said claimant was frivolous or without substantial merit.

History.
I.C., § 5-321, as added by 1971, ch. 164, § 2, p. 786.

STATUTORY NOTES

Cross References.
Interpleader, Idaho Civil Procedure Rule 22.
Third party plaintiff, Idaho Civil Procedure Rule 14(a).

Prior Laws.
Former § 5-321, which comprised R.S., R.C., & C.L., § 4110; C.S., § 6654; I.C.A., § 5-321, was repealed by S.L. 1971, ch. 164, § 1.

JUDICIAL DECISIONS

Attorney's Fees.
In an action to determine the ownership of land which was initiated by way of interpleader by a third party with contract rights to hay grown on the land, the award of attorney's fees to such third party was authorized by this section. Furness v. Park, 98 Idaho 617, 570 P.2d 854 (1977).

Cited in: Travelers Ins. Co. v. Johnson, 97 Idaho 336, 544 P.2d 294 (1975); Security Pac. Bank v. Curtis, 123 Idaho 320, 847 P.2d 1181 (Ct. App. 1993); Post v. Idaho Farmway, Inc., 135 Idaho 475, 20 P.3d 11 (2001).

Decisions Under Prior Law

Analysis

Corporations' rights to interplead claimants.
Depositary in escrow agreement.
Property levied on.

Corporations' Rights to Interplead Claimants.
Corporation may protect itself in case of conflicting claims to corporate stock by filing an interpleader and surrendering the certificates to the court. Tobias v. Wolverine Mining Co., 52 Idaho 576, 17 P.2d 338 (1932).

Depositary in Escrow Agreement.
Where a mining company enters into a contract with other parties for the sale of mining stock and an escrow agreement is entered into whereby the stock and agreements are deposited with a bank and a controversy arises between the parties to the contract and escrow agreement as to what shall be done with the stock and the cash paid for the stock, the depositary may bring an action to require the adverse parties to interplead, and, upon proper allegations the court may permit the escrow to turn such stock and money into the hands of the court and, thus, relieve the escrow holder from further responsibility. First Nat'l Bank v. Callahan Mining Co., 28 Idaho 627, 155 P. 673 (1916).

Property Levied On.
Where third party claimed property levied on, sheriff had to either return it to judgment debtor or third party; he could not hold it and institute interpleader to have rights of claimants decided. Acker v. Coleman, 60 Idaho 118, 88 P.2d 869 (1939).

RESEARCH REFERENCES

Am. Jur. — 45 Am. Jur. 2d, Interpleader, § 1 et seq.

C.J.S. — 48 C.J.S., Interpleader, § 1 et seq.

5-322. Intervention. [Repealed.]

STATUTORY NOTES

Compiler's Notes.
This section, which comprised C.C.P. 1881, § 202; R.S., R.C., & C.L., § 4111; C.S., § 6655; am. 1927, ch. 57, § 1, p. 70; I.C.A., § 5-322, was repealed by S.L. 1975, ch. 242, § 1, effective March 31, 1975. For present

rule, see Idaho Civil Procedure Rules 24(a) and 24(b).

5-323. Actions against partners. [Repealed.]

STATUTORY NOTES

Compiler's Notes.
This section, which comprised C.C.P. 1881, § 203; R.S., R.C., & C.L., § 4112; C.S., § 6656; I.C.A., § 5-323, was repealed by S.L. 1975, ch. 242, § 1, effective March 31, 1975. For present rule, see Idaho Civil Procedure Rules 4(d)(4) and 17(d).

5-324. Additional parties. [Repealed.]

STATUTORY NOTES

Compiler's Notes.
This section, which comprised C.C.P. 1881, § 204; R.S., R.C., & C.L., § 4113; C.S., § 6657; am. 1927, ch. 60, § 1, p. 73; I.C.A., § 5-324, was repealed by S.L. 1975, ch. 242, § 1, effective March 31, 1975. For present rule, see Idaho Civil Procedure Rules 13(g), 13(h), 14(a), 14(b), 15(a), 19(a)(1-3), 20(a).

5-325. Unknown owners or heirs as parties. [Repealed.]

STATUTORY NOTES

Compiler's Notes.
This section, which comprised 1903, p. 370, § 1; reen. R.C. & C.L., § 4114; C.S., § 6658; I.C.A., § 5-325, was repealed by S.L. 1975, ch. 242, § 1. For present rule, see Idaho Civil Procedure Rules 9(a), 10(a)(4), 17(d).

5-326. Unknown owners or heirs — Effect of judgments and decrees. — Judgments and decrees rendered in actions or proceedings when persons have been made parties and served by publication of summons, shall have the same effect in all respects as if such persons had been made parties by their own proper names, and had been served by publication and mailing of summons according to the statutes in such case made and provided. If in such action or proceeding persons are made parties by the designation of unknown heirs as aforesaid, the judgment or decree shall be conclusive as to all heirs of such deceased party. When in any action or proceeding persons are made defendants by the designation of unknown devisees as aforesaid, the judgment or decree in such proceeding shall be conclusive as against all devisees of such deceased person. When in any action or proceeding persons are made defendants by the designation of unknown owners as aforesaid, the judgment or decree rendered in such action or proceeding shall be conclusive as against the world, including all contingent interests in the controversy and persons not in being who may have an interest or contingent interest therein.

History.
1903, p. 370, § 3; reen. R.C. & C.L., § 4116; C.S., § 6660; am. 1927, ch. 111, § 1, p. 154; I.C.A., § 5-326.

STATUTORY NOTES

Cross References.
Pleadings, unknown parties, Idaho Civil Procedure Rules 9(a), 10(a)(4).
Unknown owners or heirs as parties, Idaho Civil Procedure Rule 17(d).

RESEARCH REFERENCES

Am. Jur. — 62B Am. Jur. 2d, Process, § 222 et seq.

5-327. Personal injuries — Property damage — Death of wrongdoer — Death of injured party — Survival of action. — (1) Causes of action arising out of injury to the person or property, or death, caused by the wrongful act or negligence of another, except actions for slander or libel, shall not abate upon the death of the wrongdoer, and each injured person or the personal representative of each one meeting death, as above stated, shall have a cause of action against the personal representative of the wrongdoer; provided, however, the punitive damages or exemplary damages shall not be awarded nor penalties adjudged in any such action; provided, however, that the injured person shall not recover judgment except upon some competent, satisfactory evidence corroborating the testimony of said injured person regarding negligence and proximate cause.

(2) A cause of action for personal injury or property damage caused by the wrongful act or negligence of another shall not abate upon the death of the injured person from causes not related to the wrongful act or negligence. Provided however, that the damages that may be recovered in such action are expressly limited to those for: (i) medical expenses actually incurred, (ii) other out-of-pocket expenses actually incurred, and (iii) loss of earnings actually suffered, prior to the death of such injured person and as a result of the wrongful act or negligence. Such action shall be commenced or, if already commenced at the time of the death of the injured person, shall be thereafter prosecuted by the personal representative of the estate of the deceased person or, if there be no personal representative appointed, then by those persons who would be entitled to succeed to the property of the deceased person according to the provisions of section 5-311(2)(a), Idaho Code.

History.
1949, ch. 47, § 1, p. 82; am. 1965, ch. 137, § 1, p. 270; am. 1971, ch. 209, § 1, p. 918; am. 2010, ch. 349, § 2, p. 911.

STATUTORY NOTES

Cross References.
Death of injured person, survival of action, §§ 5-311, 5-319.

Amendments.
The 2010 amendment, by ch. 349, in the section catchline, added "death of injured party" and added the subsection (1) designation and subsection (2).

Compiler's Notes.
Section 2 of S.L. 1965, ch. 137 read: "The amendments incorporated herein shall be applicable only to causes of action accruing subsequent to the effective date of this act [March 13, 1965]."

Effective Dates.
Section 3 of S.L. 1965, ch. 137 declared an emergency. Approved March 13, 1965.

JUDICIAL DECISIONS

ANALYSIS

Common law distinguished.
Damages in general.
"Injured person".
Pain and suffering.

Common Law Distinguished.
At common law if the tortfeasor died, the victim's right of action died, with him; however, this rule has been abrogated in Idaho by the enactment of this section. Evans v. Twin Falls County, 118 Idaho 210, 796 P.2d 87 (1990), cert. denied, 498 U.S. 1086, 111 S. Ct. 960, 112 L. Ed. 2d 1048 (1991).

Damages in General.
The classification in this section, entitling those suing the tortfeasor to recover full damages awarded by the trier of fact and limiting the damages to $10,000 for those suing the tortfeasor's representative, was not in conflict with equal protection clause. Stucki v. Loveland, 94 Idaho 621, 495 P.2d 571 (1972) (decision prior to 1971 amendment).

Limitation on damages of this section applied to "each person injured or killed," and the preceding language in this section vested the cause of action in "each injured person or the personal representative of each one meeting death". Stucki v. Loveland, 94 Idaho 621, 495 P.2d 571 (1972) (decision prior to 1971 amendment).

"Injured Person".
"Injured person" in this section referred to the victim of the tort and not to each of heirs of the victim. Stucki v. Loveland, 94 Idaho 621, 495 P.2d 571 (1972).

Pain and Suffering.
An action for pain and suffering does not survive the death of the injured party, and § 32-906 does not provide that pain and suffering is community property rather than the separate property of the injured spouse. Evans v. Twin Falls County, 118 Idaho 210, 796 P.2d 87 (1990), cert. denied, 498 U.S. 1086, 111 S. Ct. 960, 112 L. Ed. 2d 1048 (1991).

Cited in: Billings v. Sisters of Mercy, 86 Idaho 485, 389 P.2d 224 (1964); Hayslip v. George, 92 Idaho 349, 442 P.2d 759 (1968); Petersen v. Parry, 92 Idaho 647, 448 P.2d 653 (1968); Doggett v. Boiler Eng'r & Supply Co., 93 Idaho 888, 477 P.2d 511 (1970); Estate of Shaw v. Dauphin Graphic Machs., Inc., 392 F. Supp. 2d 1230 (D. Idaho 2005); Craig v. Gellings, — Idaho —, 219 P.3d 1208 (Ct. App. 2009).

RESEARCH REFERENCES

C.J.S. — 1 C.J.S., Abatement and Revival, § 129 et seq.
A.L.R. — Who, other than parent, may recover for loss of consortium on death of minor child. 84 A.L.R.5th 687.

5-328. State a party defendant in suit affecting title to real or personal property. — In any action or proceeding, whether judicial or summary, affecting the title to real or personal property in which the state of Idaho has, or claims to have an interest, lien or claim, the state of Idaho may be made a party defendant to such action or proceeding, and its rights or interests determined; provided that a judicial sale or a trustee sale under a deed of trust shall have the same effect respecting the discharge of the property from claims or encumbrances held by the state of Idaho as may be provided with respect to such matters by law as to other persons, and provided further that in no event shall any money judgment or cost be rendered against the state of Idaho in such action or proceeding.

History.
1959, ch. 55, § 1, p. 116.

JUDICIAL DECISIONS

Property Within Indian Reservation.
Suit by federally recognized Indian tribe brought in federal court against the state and various state agencies, and numerous state officials in their individual capacities, seeking title to the banks and submerged lands of lakes and various rivers and streams that were within their reservation and a declaratory judgment to establish the tribe's entitlement to the exclusive use, occupancy and right to quiet enjoyment of the submerged lands as well as a declaration of the invalidity of all Idaho statutes, ordinances, regulations, customs or usages which purport to regulate, authorize, use or affect in any way the submerged land and a permanent injunction prohibiting the state from permitting or taking any action in violation of the tribe's rights of exclusive use was barred by Idaho's Eleventh Amendment immunity since the exception of *Ex Parte Young*, 209 U.S. 123, 52 L. Ed. 714, 28 S.Ct. 441 (1908), did not apply and a state forum was available to hear such claims. Idaho v. Coeur d'Alene Tribe, 521 U.S. 261, 117 S. Ct. 2028, 138 L. Ed. 2d 438 (1997).

Cited in: Hutchins v. Trombley, 95 Idaho 360, 509 P.2d 579 (1973).

RESEARCH REFERENCES

Am. Jur. — 72 Am. Jur. 2d, States, Territories and Dependencies, § 110.

C.J.S. — 81A C.J.S., States, § 550.

5-329. Service of process upon attorney general. — Process or notice as required by law in any such proceeding, whether judicial or summary, may be made upon the attorney general of the state of Idaho in the same manner and within the same time limited by law with respect to other parties to any such action or proceeding.

History.
1959, ch. 55, § 2, p. 116.

STATUTORY NOTES

Effective Dates.
Section 3 of S.L. 1959, ch. 55 declared an emergency. Approved March 3, 1959.

RESEARCH REFERENCES

Am. Jur. — 72 Am. Jur. 2d, States, Territories and Dependencies, § 94.

C.J.S. — 81A C.J.S., States, §§ 574, 575.

5-330. Immunity of persons giving first aid from damage claim. — That no action shall lie or be maintained for civil damages in any court of this state against any person or persons, or group of persons, who in good faith, being at, or stopping at the scene of an accident, offers and administers first aid or medical attention to any person or persons injured in such accident unless it can be shown that the person or persons offering or administering first aid, is guilty of gross negligence in the care or treatment of said injured person or persons or has treated them in a grossly negligent manner. The immunity described herein shall cease upon delivery of the injured person to either a generally recognized hospital for treatment of ill

or injured persons, or upon assumption of treatment in the office or facility of any person undertaking to treat said injured person or persons, or upon delivery of said injured person or persons into custody of an ambulance attendant.

History.
1965, ch. 241, § 1, p. 591.

RESEARCH REFERENCES

Am. Jur. — 57A Am. Jur. 2d, Negligence, §§ 90 to 95.
61 Am. Jur. 2d, Physicians, Surgeons, and Other Healers, § 282.
C.J.S. — 65 C.J.S., Negligence, § 86.
A.L.R. — Construction of "good Samaritan" statute excusing from civil liability one rendering care in emergency. 68 A.L.R.4th 294.

5-331. Immunity of volunteer ambulance attendant. — No action shall lie or be maintained for civil damages in any court of this state against any person or persons, or group of persons, including volunteer ambulance attendants, who offers and administers first aid or emergency medical attention as a part of his volunteer service as an ambulance attendant to any person or persons utilizing the volunteer services and facilities, unless it can be shown that the person or persons offering or administering first aid or emergency medical attention is guilty of gross negligence in the care or treatment offered or administered, or has treated them in a grossly negligent manner. The immunity described herein shall cease upon delivery of the injured or treated person to either a generally recognized hospital for treatment of ill or injured persons, or upon assumption of treatment in the office or facility of any person undertaking to treat said ill or injured person or persons.

History.
I.C., § 5-331, as added by 1976, ch. 186, § 1, p. 673.

STATUTORY NOTES

Effective Dates.
Section 2 of S.L. 1976, ch. 186 declared an emergency. Approved March 19, 1976.

RESEARCH REFERENCES

Am. Jur. — 57A Am. Jur. 2d, Negligence, §§ 90 to 95.
61 Am. Jur. 2d, Physicians, Surgeons, and Other Healers, § 132.
C.J.S. — 65 C.J.S., Negligence, § 86.
A.L.R. — Construction and application of "good Samaritan" statutes. 68 A.L.R.4th 294.
Right of tortfeasor initially causing injury to recover indemnity or contribution from medical attendant causing new injury or aggravating injury in course of treatment. 72 A.L.R.4th 231.

5-332. Consent for emergency medical treatment. — The authorization or refusal of consent for emergency medical treatment under section 5-330 or 5-331, Idaho Code, shall be governed by chapter 45, title 39, Idaho Code.

History.
I.C., § 5-332, as added by 1976, ch. 318, § 1, p. 1089; am. 2005, ch. 120, § 3, p. 380.

5-333. Immunity of underground mine rescue participants, their employers and representatives. — No person or persons engaged in underground mine rescue or recovery work who, in good faith, render(s) emergency care, rescue, assistance or recovery services at the scene of any emergency in a mine in this state, shall be liable for any civil damages as a result of any act or omission by such person(s) in rendering such emergency care, rescue, assistance or recovery service.

Neither the employer nor a labor organization which represents any person(s) entitled to the immunity provided in this act shall be liable for any civil damages as a result of any act or omission of any person(s) entitled to such immunity.

History.
I.C., § 5-333, as added by 1981, ch. 165, § 1, p. 291.

STATUTORY NOTES

Compiler's Notes.
The letter in parentheses so appeared in the law as enacted.

The words "this act," in the second paragraph, refer to S.L. 1981, ch. 165, which is codified as this section.

5-334. Act or omission preventing abortion not actionable. — (1) A cause of action shall not arise, and damages shall not be awarded, on behalf of any person, based on the claim that but for the act or omission of another, a person would not have been permitted to have been born alive but would have been aborted.

(2) The provisions of this section shall not preclude causes of action based on claims that, but for a wrongful act or omission, fertilization would not have occurred, maternal death would not have occurred or disability, disease, defect or deficiency of an individual prior to birth would have been prevented, cured or ameliorated in a manner that preserved the health and life of the affected individual.

History.
I.C., § 5-334, as added by 1985, ch. 147, § 1, p. 394; am. 2010, ch. 235, § 1, p. 542.

STATUTORY NOTES

Amendments.
The 2010 amendment, by ch. 235, substituted "disability" for "handicap" in subsection (2).

Effective Dates.
Section 2 of S.L. 1985, ch. 147 declared an emergency. Approved March 21, 1985.

JUDICIAL DECISIONS

Claim Barred.

Wrongful birth claims are prohibited under this section, barring the patient's claim for negligent infliction of emotional distress; at no time did the patient move to amend her complaint to state a claim for negligent infliction of emotional distress that did not specifically rely upon the wrongful birth allegations. Vanvooren v. Astin, 141 Idaho 440, 111 P.3d 125 (2005).

5-335. General rules of pleading — Claims for relief. — A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain (1) if the court has limited jurisdiction, a short and plain statement of the grounds upon which the court's jurisdiction depends, (2) a short and plain statement of the claims showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief to which the pleader deems himself or herself entitled. Relief in the alternative or of several different types may be demanded. In any action for recovery because of personal injury or death, the claim for relief shall not specify the amount of damages claimed, but shall, instead, contain a general allegation of damage and shall state that the damages claimed are within any minimum or maximum jurisdictional limits of the court to which the pleading is addressed. At any time after service of the pleading, the defendant may, by special interrogatory, demand a statement of the amount of damages claimed by the plaintiff, which shall be answered within fifteen (15) days. The information provided in the response to the special interrogatory shall not be admissible into evidence at trial, nor shall it be communicated to the jury by argument or otherwise, nor shall it affect or limit the verdict rendered by the jury or the judgment issued by the court, in accordance with Idaho rule of civil procedure 54(c).

History.

I.C., § 5-335, as added by 1987, ch. 278, § 9, p. 571.

STATUTORY NOTES

Effective Dates.

Section 18 of S.L. 1987, ch. 278 read: "The provisions of this act shall take effect on July 1, 1987, provided however, that Section [Sections] 1 through 11 shall apply only to causes of action which accrue on and after July 1, 1987. Provided further, that Section 6-1603, Idaho Code, as enacted herein, is hereby repealed and does sunset for causes of action which accrue after June 30, 1992."

JUDICIAL DECISIONS

Analysis

Jurisdictional limits.
Specifying amount of damages.

Jurisdictional Limits.

Although the language of § 12-120(1) seems to conflict with this section and Idaho Civil Procedure Rule 9(g), these statutes and rule should be reconciled, if possible, so that the provisions of each will not be nullified. Rule 9(g) and this section suggest a way to do this. According to the rule, "no dollar amount or figure should be included in the complaint beyond a statement reciting that the jurisdictional amount established for filing the action is satisfied;" a similar general pleading should suffice to support a claim for attorney fees under § 12-120(1). For example, the complaint could contain an appropriate general allegation that the plaintiff's claim is within

the jurisdictional limits of the district court, or magistrate's division thereof. The complaint could separately allege that "plaintiff's claim for damages does not exceed the limit set by § 12-120(1) and plaintiff is entitled to an award of attorney fees under this statute." Such allegations would satisfy the jurisdictional pleading requirement and also afford a plaintiff—or defendant—an opportunity to recover attorney fees under § 12-120(1) without contravening § 5-335 or Idaho Civil Procedure Rule 9(g). Czerwinsky v. Lieske, 122 Idaho 96, 831 P.2d 564 (Ct. App. 1992).

Specifying Amount of Damages.

Because subdivision (1) of § 12-120 requires a party to specify the maximum amount of damages claimed and this section forbids a personal injury plaintiff from claiming a specific amount of damages, the statutes admittedly are difficult to reconcile. Therefore, to invoke the entitlement to attorney fees pursuant to § 12-120, the complaint should also allege that the plaintiff's claim for damages does not exceed the limit established by § 12-120 and that the plaintiff is entitled to an award of attorney fees pursuant to § 12-120; since this allegation will not specify the precise amount of damages claimed by the plaintiff, it will not violate this section. Cox v. Mueller, 125 Idaho 734, 874 P.2d 545 (1994).

5-336. Demand for judgment — Default judgments. — A judgment by default shall not be different in kind from or exceed in the amount that prayed for in the demand for judgment. Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleading. Provided, however, if a judgment by default is entered in any claim for relief for personal injury or death pursuant to Idaho rule of civil procedure 8(a)(1), after default is entered, the court shall conduct such hearings or order such reference as it deems necessary and proper pursuant to Idaho rule of civil procedure 55(b)(2) to determine the appropriate amount of damages.

History.

I.C., § 5-336, as added by 1987, ch. 278, § 10, p. 571.

STATUTORY NOTES

Compiler's Notes.

Section 19 of S.L. 1987, ch. 278 read: "The provisions of this act are hereby declared to be severable and if any provision of this act or the application of such provision to any person or circumstance is declared invalid for any reason, such declaration shall not affect the validity of remaining portions of this act."

Effective Dates.

Section 18 of S.L. 1987, ch. 278 read: "The provisions of this act shall take effect on July 1, 1987, provided however, that Section [Sections] 1 through 11 shall apply only to causes of action which accrue on and after July 1, 1987. Provided further, that Section 6-1603, Idaho Code, as enacted herein, is hereby repealed and does sunset for causes of action which accrue after June 30, 1992."

5-337. Immunity for use of automated external defibrillator (AED). — (1) As used in this section, "defibrillator" means an "automated external defibrillator (AED)" which has been prescribed by a physician or osteopath licensed pursuant to chapter 18, title 54, Idaho Code.

(2) In order to promote public health and safety:

(a) A person or entity who acquires a defibrillator as a result of a prescription shall ensure that:

(i) Expected defibrillator users receive training in its use and care equivalent to the CPR and AED training of the American heart association, the American red cross or similar entities;

(ii) The defibrillator is maintained and tested by the owner according to the manufacturer's operational guidelines;

(iii) There is involvement of a licensed physician in the owner's program to ensure compliance with requirements for training, notification, maintenance and guidelines for use;

(iv) Any person who renders emergency care or treatment to a person in cardiac arrest by using a defibrillator must activate the emergency medical services system as soon as possible, and must report any clinical use of the defibrillator to the prescribing physician.

(b) Any person or entity who acquires a defibrillator as a result of a prescription shall notify an agent of the emergency communications system or emergency vehicle dispatch center of the existence, location and type of defibrillator.

(3)(a) Any person who reasonably renders emergency care using a defibrillator, without remuneration or expectation of remuneration, at the scene of an accident or emergency to a victim of the accident or emergency shall not be liable for any civil damages resulting from the person's acts or omissions.

(b) No cause of action shall be maintained against a licensed physician, osteopath, physician assistant, nurse practitioner, or nurse, or against an emergency medical technician, fireman, peace officer, ambulance attendant or other person trained to use a defibrillator, or against a person or entity who acquires or maintains a defibrillator which arises from the reasonable use of a defibrillator in an emergency setting and no cause of action shall be maintained against the physician or osteopath who wrote the prescription for the defibrillator if the prescription was written in good faith.

(c) This immunity from civil liability does not apply if the acts or omissions amount to gross negligence or willful or wanton or reckless misconduct.

(4) A defibrillator acquired pursuant to a prescription and possessed in compliance with subsection (2) of this section is exempt from the provisions of chapter 10, title 56, Idaho Code.

History.

I.C., § 5-337, as added by 1999, ch. 351, § 1, p. 937; am. 2004, ch. 129, § 1, p. 447; am. 2008, ch. 299, § 1, p. 836; am. 2010, ch. 344, § 1, p. 901.

STATUTORY NOTES

Amendments.

The 2008 amendment, by ch. 299, in subsection (2)(a)(ii), inserted "by the owner"; in subsection (2)(a)(iii), substituted "owner's program" for "site's program"; added subsections (3)(a) and (3)(d); and added the subsection (3)(b) and (3)(c) designations; in subsection (3)(b), inserted "or against a person or entity who acquires or maintains a defibrillator" and substituted "reasonable use" for "good faith use"; and in subsection (3)(d), inserted "or reckless."

The 2010 amendment, by ch. 344, deleted paragraph (3)(d), which read: "The protection afforded within paragraph (a) of this subsection is applicable to a person or entity who

acquires or maintains a defibrillator if such person or entity complies with the maintenance requirements set forth in subsection (2)(a)(ii) of this section."

Effective Dates.

Section 2 of S.L. 1999, ch. 351 declared an emergency. Approved March 25, 1999.

Section 2 of S.L. 2004, ch. 129 declared an emergency. Approved March 19, 2004.

5-338. Immunity of donors of wild game meat. — (1) A donor of wild game meat for free use by a charitable organization is immune from civil or criminal liability arising from an injury or death attributable to the nature, age, condition or packaging of the donated wild game meat if the injury or death is not a result of the gross negligence, recklessness, or intentional misconduct of the donor and the donated wild game meat is prepared and packaged by a commercial butcher, commercial slaughterhouse, commercial meat processor or similar entity subject by law to regular state or federal inspection and licensing.

(2) A charitable organization that receives, distributes or serves donated wild game meat is immune from civil or criminal liability arising from an injury or death attributable to the condition of the meat if:

(a) The charitable organization uses appropriate food storage and handling equipment to provide for the safe and sanitary storage and/or service of the wild game meat;

(b) The charitable organization accepts only wild game meat prepared and packaged by a commercial butcher, commercial slaughterhouse, commercial meat processor, or similar entity subject by law to regular state or federal inspection and licensing;

(c) The charitable organization inspects the donated wild game meat in a reasonable manner and finds it to be apparently fit for human consumption at the time of distribution or service;

(d) The charitable organization has no actual or constructive knowledge at the time the wild game meat is distributed or served that it is adulterated, tainted, contaminated, or would be harmful to the health or well-being of a person eating it; and

(e) An injury or death caused by eating the wild game meat is not a proximate cause of the gross negligence, recklessness or intentional misconduct of the charitable organization.

(3) For purposes of this section:

(a) "Charitable organization" means a nonprofit organization that is exempt from taxation under the provisions of sections 501(c)(3) and 501(c)(4) of the Internal Revenue Code, as amended.

(b) "Donor" means a person, retailer, commercial butcher, commercial slaughterhouse, commercial meat processor, or similar entity under state supervision, and the Idaho fish and game department in its capacity as a donor of unlawfully taken or unclaimed wildlife pursuant to section 36-1304, Idaho Code.

(c) "Wild game meat" means any raw, cooked, processed, or prepared edible meat from a game animal killed in the wild and used or intended for use in whole or in part for human consumption and which is exempt from the inspection requirements of the federal wholesome meat act;

provided however, that wild game salami may not be donated. Wild game meat shall not be considered "adulterated" as that term is defined in chapter 1, title 37, Idaho Code, and IDAPA 16.02.19, merely because the meat is the product of a game animal killed in the wild and not slaughtered by a butcher in a state or federally regulated food processing establishment. Wild game meat shall be considered "wildlife" as that term is used in IDAPA 16.02.19, and shall be handled, prepared and served accordingly if the charitable organization is a food establishment as defined in the rules.

History.
I.C., § 5-338, as added by 2000, ch. 263, § 1, p. 739; am. 2006, ch. 94, § 2, p. 267.

STATUTORY NOTES

Cross References.
Fish and game department, § 36-101 et seq.
Food deemed adulterated, § 37-122.

Amendments.
The 2006 amendment, by ch. 94, in subsection (3)(c), deleted "or chapter 19, title 37, Idaho Code" following "wholesome meat act", and substituted "chapter 1, title 37" for "chapters 1 and 19, title 37".

Federal References.
Sections 501(c)(3) and 501(c)(4), referred to in paragraph (3)(a), are codified as 26 U.S.C.S. §§ 501(c)(3) and 501(c)(4).
The federal wholesome meat act, referred to in paragraph (3)(c), is codified as 21 U.S.C.S. § 601 et seq.

5-339. Immunity of food donor and food bank. — (1) It shall not be negligence for a donor of food to donate food apparently fit for human consumption at the time of its donation solely because:

(a) The label on the food is missing or the food is otherwise misbranded; or

(b) The food, if offered for sale commercially, would not be readily marketable because of appearance or grade, or because it is surplus.

(2) A food bank that receives and distributes food apparently fit for human consumption shall not be found negligent or liable for damages caused by food it distributes if:

(a) The food bank inspects the food received in a reasonable manner and finds it to be apparently fit for human consumption at the time of distribution;

(b) The food bank has no actual or constructive knowledge at the time the food is distributed that it is adulterated, tainted, contaminated, or would be harmful to the health or well-being of an individual consuming it; and

(c) The injury or death is not proximately caused by the misconduct of the food bank.

(3) It shall not be negligence for a food bank to distribute food apparently fit for human consumption at the time of its distribution solely because:

(a) The label on the food is missing or the food is otherwise misbranded; or

(b) The food, if offered for sale commercially, would not be readily marketable because of appearance or grade, or because it is surplus.

(4) For purposes of this section:

(a) "Donor" includes a person, farmer, rancher, retailer, slaughterhouse under state supervision, freight company, distributor, wholesaler, meat processor, seafood processor, or similar entity, and a person who acts in a commercial capacity as a manufacturer, packer, processor, bottler, or similar entity, even if that activity is the person's primary activity.

(b) "Food" means any raw, cooked, processed, or prepared edible substance, ice, beverage, or ingredient used or intended for use in whole or in part for human consumption.

(c) "Food bank" means a nonprofit organization that operates principally to collect, inspect, and salvage donated food for free distribution either to needy persons or to nonprofit organizations for free distribution to needy persons. In this paragraph, "nonprofit organization" means an organization recognized by the state or federal government as a nonprofit organization.

(5) This section does not apply to donations of wild game meat to charitable institutions. Liability and immunity for donations of wild game meat to charitable institutions shall be determined according to section 5-338, Idaho Code.

History.
I.C., § 5-339, as added by 2000, ch. 321, § 1, p. 1088.

STATUTORY NOTES

Cross References.
Food donors and gleaners exempt from liability, § 6-1302.

5-340. Immunity of radio and television broadcasting organizations participating in the Amber Alert system. — No cause of action shall be maintained for civil damages in any court of this state against any radio or television broadcast organization, or the employees, officers, directors, managers or agents of such radio or television broadcast organization, based on the broadcast of information supplied by state law enforcement officials pursuant to the voluntary broadcast notification system commonly known as the "Amber Alert," which is used to notify the public of missing or abducted children.

History.
I.C., § 5-340, as added by 2003, ch. 91, § 1, p. 277.

5-341. Immunity of employers allowing employee firearm storage. — No action shall lie or be maintained for civil damages in any court of this state against an employer where the claim arises out of the policy of an employer to either specifically allow or not prohibit the lawful storage of firearms by employees in their personal motor vehicles on the employer's business premises.

History.
I.C., § 5-341, as added by 2009, ch. 265, § 1, p. 802.

5-342. Immunity for search and rescue operations. — No person serving as a volunteer member of a search and rescue operation constituted pursuant to section 31-2229, Idaho Code, may have their actions or omissions occurring during the search and rescue operation found to be the proximate cause of injuries to a person subject of a search or rescue, unless the volunteer's actions or omissions are not done in good faith or are grossly negligent. This limitation of liability applies notwithstanding the fact that an organization may recover costs incurred incident to the search and rescue operation or rendering of emergency care.

History.
I.C., § 5-342, as added by 2010, ch. 247, § 1, p. 636.

CHAPTER 4

PLACE OF TRIAL OF CIVIL ACTIONS

5-401. Actions relating to real property. — Actions for the following causes must be tried in the county in which the subject of the action or some part thereof is situated, subject to the power of the court to change the place of trial, as provided in this code:

1. For the recovery of real property, or of an estate or interest therein, or for the determination in any form of such right or interest and for injuries to real property.

2. For the partition of real property.

3. For the foreclosure of a mortgage of real property. Where the real property is situated partly in one county and partly in another, the plaintiff may select either of the counties, and the county so selected is the proper county for the trial of such action.

History.
C.C.P. 1881, § 205; R.S., R.C., & C.L., § 4120; C.S., § 6661; I.C.A., § 5-401.

STATUTORY NOTES

Cross References.
Change of venue, Idaho Civil Procedure Rule 40(e).
Recording of judgment in original county when venue changed, § 5-409.
Venue of probate proceedings, § 15-1-303.

Compiler's Notes.

The words "this code", at the end of the first paragraph, refer to the Code of Civil Procedure, which is a division of the Idaho Code consisting of Titles 1 through 13.

JUDICIAL DECISIONS

Analysis

Application of Section.

This section only applies if primary object of litigation is to determine title or an interest in real estate. Jarvis v. Hamilton, 73 Idaho 131, 246 P.2d 216 (1952).

Construction in General.

The provisions of this statute, requiring actions for recovery of realty to be filed in county where same is located, are mandatory and jurisdictional. Banbury v. Brailsford, 66 Idaho 262, 158 P.2d 826 (1945), overruled on other grounds, Thompson v. Turner, 98 Idaho 110, 558 P.2d 1071 (1977).

Where purchaser of real property at a probate sale fails to fulfill his contract and breaches same, the vendor has an election of remedies; he may proceed under § 15-720 (repealed), or he may proceed in the district court and recover possession. Hunter v. Clawson, 70 Idaho 324, 216 P.2d 949 (1950).

This section should not be construed to limit subject-matter jurisdiction in an action affecting title to or possession of real estate to the court of the county where the real estate is located since § 5-409 provides that in cases where such an action is brought in another county, a copy of the final judgment must be transmitted to the clerk of court of the county where the real estate is located. Thompson v. Turner, 98 Idaho 110, 558 P.2d 1071 (1977).

Foreclosure Suits.

In suit to establish trust and foreclose mortgage in certain county, court has jurisdiction to proceed against mortgage security in that county. Zohos v. Marefolos, 48 Idaho 291, 281 P. 1114 (1929).

Marital Relationship.

A divorce action in Idaho is sui generis with the marital relationship as the res of the action and is ambulatory with the person of one or the other of the spouses. Finnell v. Finnell, 59 Idaho 148, 81 P.2d 401 (1938).

Motion to Change Venue.

A motion for change of trial to place where realty sought to be recovered was situated which was supported by affidavit, sufficiently met the requirements of statute. Banbury v. Brailsford, 66 Idaho 262, 158 P.2d 826 (1945), overruled on other grounds, Thompson v. Turner, 98 Idaho 110, 558 P.2d 1071 (1977).

Personal Judgment Ordering Conveyance of Property.

While it is well settled that a judgment of a court of one state cannot directly affect title to realty located in another state, a personal judgment ordering a conveyance of the property by a party is a valid exercise of a court's power. Andre v. Morrow, 106 Idaho 455, 680 P.2d 1355 (1984).

Rents and Profits.

Where supplemental complaint asked for an accounting of rents and profits, it did not change the original action to cancel deeds and quiet title in plaintiff to a transitory action, since the primary object was the recovery of realty. Banbury v. Brailsford, 66 Idaho 262, 158 P.2d 826 (1945), overruled on other grounds, Thompson v. Turner, 98 Idaho 110, 558 P.2d 1071 (1977).

Summons.

Where caption on copy of summons and the copy of the complaint served upon defendant correctly informed him of the pendency of the action and the court in which such action was pending, the summons was not absolutely void although it directed defendant to appear in the wrong county. Mattice v. Babcock, 52 Idaho 653, 20 P.2d 207 (1932).

Transitory Actions.

Where pleadings disclosed that primary purpose of complaint was to secure a determi-

nation of relation as a partnership and its dissolution thereof, and relief as to real estate held by the partnership was incidental, the action was transitory. Jarvis v. Hamilton, 73 Idaho 131, 246 P.2d 216 (1952).

Trespass or Injuries to Land.

Action for trespass upon lands can be sustained only in jurisdiction where such lands are situated. Taylor v. Sommers Bros. Match Co., 35 Idaho 30, 204 P. 472 (1922).

When an action is for a trespass on realty and also for the taking and destroying of personalty, but the chief cause of action is for injury to real estate, it is local. Taylor v. Sommers Bros. Match Co., 35 Idaho 30, 204 P. 472 (1922).

Lands lying in another state or country and trespassed upon, injured, or damaged cannot be made the subject of an action in Idaho. Taylor v. Sommers Bros. Match Co., 35 Idaho 30, 204 P. 472 (1922).

Action for injuries to real property should be brought in county where such real estate is situated. Brown v. Tamarack & Custer Consol. Mining Co., 37 Idaho 650, 218 P. 363 (1923).

As general rule, grasses growing from perennial roots are fructus naturales and real property within meaning of this section. Severe v. Gooding, 43 Idaho 755, 254 P. 1054 (1927).

Venue.

Proper venue for determination of partnership matters is as a general rule in the county where the partners reside not where the assets are held, even though part of the assets are real estate. Jarvis v. Hamilton, 73 Idaho 131, 246 P.2d 216 (1952).

Water Rights.

A federal district court sitting in Utah could not adjudicate water rights in Idaho except as to some interstate features; and as to the priorities and rights in Idaho, they must be remitted to an Idaho state court for a determination thereof. Albion-Idaho Land Co. v. Naf Irrigation Co., 97 F.2d 439 (10th Cir. 1938).

Cited in: Berg v. Carey, 40 Idaho 278, 232 P. 904 (1925); Summers v. Martin, 77 Idaho 469, 295 P.2d 265 (1956); Hutchins v. Trombley, 95 Idaho 360, 509 P.2d 579 (1973); Priest Lake Coalition, Inc. v. State ex rel. Evans, 111 Idaho 354, 723 P.2d 898 (1986).

RESEARCH REFERENCES

Am. Jur. — 77 Am. Jur. 2d, Venue, § 14 et seq.

C.J.S. — 92A C.J.S., Venue, §§ 24 to 44.

A.L.R. — Venue of damage action for breach of real-estate sales contract. 8 A.L.R.3d 489.

5-402. Actions for penalties and against officers. — Actions for the following causes must be tried in the county where the cause, or some part thereof, arose, subject to the like power of the court to change the place of trial:

1. For the recovery of a penalty or forfeiture imposed by statute, except, that when it is imposed for an offense committed on a lake, river or other stream of water, situated in two (2) or more counties, the action may be brought in any county bordering on such lake, river or stream, and opposite to the place where the offense was committed.

2. Against a public officer, or person specially appointed to execute his duties, for any act done by him in virtue of his office; or against a person who, by his command or in his aid, does anything touching the duties of such officer.

History.

C.C.P. 1881, § 206; R.S., R.C., & C.L., § 4121; C.S., § 6662; I.C.A., § 5-402.

STATUTORY NOTES

Cross References.

Change of venue, Idaho Civil Procedure Rule 40(e).

JUDICIAL DECISIONS

ANALYSIS

Actions against public officers.
Venue.

Actions Against Public Officers.

Where the plaintiffs, labor organizations, sought to enjoin the defendants, public officers, from authenticating, certifying, and enforcing a right to work bill (Acts 1985, ch. 2; § 44-2001 et seq.), based on the allegedly improper passage of the bill with an emergency clause for which no emergency allegedly existed, the trial judge correctly looked to and applied subdivision 2 of this section to determine the proper venue for this cause of action. Idaho State AFL-CIO v. Leroy, 110 Idaho 691, 718 P.2d 1129 (1986).

Venue.

Proper venue for action by state to recover penalty against holder of liquor license and surety for sale of liquor after 1::00 a.m. on Sunday was the county where the liquor was sold. State ex rel. Summers v. Lake Tavern, Inc., 73 Idaho 377, 252 P.2d 831 (1953).

Where the action involved allegations that the land board both exceeded its authority and improperly exercised its authority, part of the cause of action arose in the county where the vast majority of the land in issue was located and the persons most directly affected lived; therefore, venue was proper in that county under subdivision 2 of this section, even though the land board made its decision in a different county. Priest Lake Coalition, Inc. v. State ex rel. Evans, 111 Idaho 354, 723 P.2d 898 (1986).

Pursuant to subdivision 1, the magistrate court had venue of action regarding the suspension of driving privileges in the county where the defendant refused to submit to a blood test to determine the alcohol content of his blood. State v. Griffiths, 113 Idaho 364, 744 P.2d 92 (1987).

Cited in: Berg v. Carey, 40 Idaho 278, 232 P. 904 (1925); Hutchins v. Trombley, 95 Idaho 360, 509 P.2d 579 (1973).

RESEARCH REFERENCES

Am. Jur. — 63C Am. Jur. 2d, Public Officers and Employees, § 363.

C.J.S. — 92A C.J.S., Venue, §§ 49, 51 to 55, 124 to 126.
67 C.J.S., Officers, § 132.

5-403. Actions against counties. — An action against a county may be commenced and tried in such county unless such action is brought by a county, in which case it may be commenced and tried in any county, not a party thereto.

History.

C.C.P. 1881, § 207; R.S., R.C., & C.L., § 4122; C.S., § 6663; I.C.A., § 5-403.

JUDICIAL DECISIONS

Cited in: Berg v. Carey, 40 Idaho 278, 232 P. 904 (1925); Priest Lake Coalition, Inc. v. State ex rel. Evans, 111 Idaho 354, 723 P.2d 898 (1986).

RESEARCH REFERENCES

C.J.S. — 20 C.J.S., Counties, § 428.
92A C.J.S., Venue, §§ 124 to 126.

5-404. Other actions — Venue determined by residence — Exceptions. — In all other cases the action must be tried in the county in which the defendants, or some of them, reside, at the commencement of the action; or, if none of the defendants reside in the state, or, if residing in this state,

the county in which they reside is unknown to the plaintiff, the same may be tried in any county which the plaintiff may designate in his complaint; and if the defendant is about to depart from the state, such action may be tried in any county where either of the parties reside, or service is had, subject, however, to the power of the court to change the place of trial, as provided in this code; provided, that [in] all actions against life or fire insurance companies, suit or action may be commenced and tried in the county where the death occurred or the loss was sustained; and provided, further, that in all actions against any corporation organized under the laws of the state of Idaho, suit or action shall be commenced and tried in any county of this state where the defendant has its principal place of business or in the county in which the cause of action arose.

History.

C.C.P. 1881, § 208; R.S., § 4123; am. 1897, p. 9, § 1; reen. 1899, p. 292, § 1; reen. R.C. & C.L., § 4123; C.S., § 6664; am. 1923, ch. 79, § 1, p. 91; I.C.A., § 5-404.

STATUTORY NOTES

Cross References.

Actions against insurance companies may be brought where the loss occurs or where the policyholder resides, § 41-1838.

Aeronautics, Idaho department of, review of actions by, § 21-120.

Change of name, venue of proceedings, § 7-802.

Change of venue, Idaho Civil Procedure Rule 40(e).

Criminal and civil jurisdiction over Indians and Indian territory, § 67-5101 et seq.

Compiler's Notes.

The words "this code", refer to the Code of Civil Procedure, which is a division of the Idaho Code consisting of Titles 1 through 13.

The bracketed insertion near the middle of the section was added by the compiler to add a word unintentionally left out of the 1923 amendment of this section.

JUDICIAL DECISIONS

Analysis

Attorney's Liens.

Where law firm seeking to enforce lien for fees on three separate but interrelated cases was not required to bring independent action as to any of the three cases, venue was proper in county where actions were brought, rather than the county of the client's residence. Skelton v. Spencer, 102 Idaho 69, 625 P.2d

1072, cert. denied, 454 U.S. 894, 102 S. Ct. 390, 70 L. Ed. 2d 208 (1981).

Change of Venue.

Parties cannot stipulate for trial elsewhere. McCarty v. Herrick, 41 Idaho 529, 240 P. 192 (1925).

As a general rule, motion for change of venue is appearance in case. American Sur. Co. v. District Court, 43 Idaho 589, 254 P. 515 (1927).

Granting or refusing change of venue is within discretion of trial court. Spaulding v. Hoops, 49 Idaho 289, 287 P. 947 (1930).

A formal motion in addition to demand is not an essential prerequisite to defendant's right to change of venue. Anderson v. Springer, 78 Idaho 17, 296 P.2d 1024 (1956).

The mere filing of a request for change of venue does not deprive a judge of jurisdiction to hear the cause. Rudd v. Rudd, 105 Idaho 112, 666 P.2d 639 (1983).

Defendant corporation's waiver of venue in the county of its principle place of business was not sufficient to change venue. Pintlar Corp. v. Bunker Ltd. Partnership, 117 Idaho 152, 786 P.2d 543 (1990).

Where there was evidence upon which the district court could properly find that a contract was created and breached in the county in which the complaint was filed, that the ensuing damages occurred there, and that an unjust enrichment claim and false labor lien claim arose in the same county, the district court properly exercised its discretion when it denied a motion for change of venue. Corder v. Idaho Farmway, Inc., 133 Idaho 353, 986 P.2d 1019 (Ct. App. 1999).

Construction in General.

This section should not be construed as limiting jurisdiction of district court in action commenced before it. American Sur. Co. v. District Court, 43 Idaho 589, 254 P. 515 (1927).

Contracts Fixing Venue Invalid.

Contracts attempting to fix venue are invalid, as for example, a provision in a promissory note that it may be sued on in any county in the state. McCarty v. Herrick, 41 Idaho 529, 240 P. 192 (1925).

Corporations.

A corporation does not have the right to have actions against it tried in the county in which its principal place of business is located, or in which the agent who may have been designated under the statute resides. Smith v. Inter-Mountain Auto Co., 25 Idaho 212, 136 P. 1125 (1913).

In an action against multiple corporations, venue was proper in the county where one of the defendants had its principle place of business, rather than in the county where the cause of action arose. Pintlar Corp. v. Bunker Ltd. Partnership, 117 Idaho 152, 786 P.2d 543 (1990).

It was permissible for court to disregard defendant corporation's principal place of business when it denied a change of venue motion since the corporation had been voluntarily dismissed as a party to the lawsuit by plaintiff; although defendant was dismissed subsequent to the motion for change of venue, the dismissal occurred before any of the defendants had filed either an answer or a motion for summary judgment. Ponderosa Paint Mfg., Inc. v. Yack, 125 Idaho 310, 870 P.2d 663 (Ct. App. 1994).

Custody of Minor Child.

District court had jurisdiction of complaint to determine custody of minor child, though neither plaintiff nor defendant were residents of county in which complaint was filed, where defendant a non-resident of the state, was served by summons in the county in which the complaint was filed. Clemens v. Kinsley, 72 Idaho 251, 239 P.2d 266 (1951).

Divorce Action.

The venue of a divorce action falls under this section. Finnell v. Finnell, 59 Idaho 148, 81 P.2d 401 (1938); Rudd v. Rudd, 105 Idaho 112, 666 P.2d 639 (1983).

A divorce is sui generis with the marital relationship, the res of the action, and is ambulatory with the person of one or the other of spouses. Finnell v. Finnell, 59 Idaho 148, 81 P.2d 401 (1938).

In case the action is brought in the wrong county, defendant has the right to have the cause transferred to the county of his residence. Finnell v. Finnell, 59 Idaho 148, 81 P.2d 401 (1938).

Foreclosure and Conversion.

Action to foreclose chattel mortgage joining an action in conversion against parties who are alleged to have converted part of the chattels was properly brought in the county where the remaining chattels were situated, rather than in county of defendant's residence. Berg v. Carey, 40 Idaho 278, 232 P. 904 (1925).

Where bank's only viable cause of action in the foreclosure of a senior trust deed was an action on the note, the district court did not err in denying a change of venue from county where debtor resided to another county. First Interstate Bank v. Eisenbarth, 123 Idaho 640, 853 P.2d 640 (Ct. App. 1993).

Foreign Corporations.

For purposes of determining venue, a foreign corporation must be regarded as a resident of the county where it maintains its principal place of business in the state, subject to the choice of plaintiff in cases where

the action may be maintained in either of two or more counties and to the power of the court to change the place of trial as provided in the code. Banning v. Minidoka Irr. Dist., 89 Idaho 506, 406 P.2d 802 (1965).

Improper Venue.

Although improper venue might be an appropriate issue in a direct appeal, it affords no basis to attack a judgment collaterally. Clark v. Atwood, 112 Idaho 115, 730 P.2d 1035 (Ct. App 1986).

Improper venue does not deprive a court of jurisdiction where service has been properly made. Clark v. Atwood, 112 Idaho 115, 730 P.2d 1035 (Ct. App. 1986).

Joint Tortfeasors.

Plaintiff has right to sue tortfeasors either jointly or severally; if sued severally, venue lies in county in which defendant resides, and he has inherent right to trial there; if sued jointly, action may be tried in any county in which either defendant may reside. Big Springs Land & Live Stock Co. v. Beck, 45 Idaho 509, 263 P. 477 (1928).

Libel and Slander.

The common-law rule that libel suit may be brought in any county in which a paper is circulated was abrogated by this section and the action must be brought where the paper is published. O'Malley v. Statesman Printing Co., 60 Idaho 326, 91 P.2d 357 (1939).

Where a newspaper was composed, printed, and published in Ada County, and immediately after being put into type, the alleged libelous article was printed in the paper and copies thereof were circulated in all counties of the state, not less than 7,000 in number in Ada County, and approximately 70 in Bannock County, where the plaintiff resided, the plaintiff's cause of action arose in Ada County, and not in Bannock County; and where the suit was filed in Bannock County, the defendant was entitled to a change of venue to Ada County. O'Malley v. Statesman Printing Co., 60 Idaho 326, 91 P.2d 357 (1939).

An action for libel may be properly tried in the county wherein the defendants reside in accord with this section; on the other hand, the defendants may waive their right to have the action tried in the county of their residence. Bistline v. Eberle, 85 Idaho 167, 376 P.2d 501 (1962).

Malpractice.

A malpractice suit is a transitory action and place of trial is at the place of the residence of the defendant or some of the defendants. Anderson v. Springer, 78 Idaho 17, 296 P.2d 1024 (1956).

Nonresidents.

Nonresident is subject to service in a suit filed by resident while in state attending hearing in a suit filed against him by another resident. Lacharite v. District Court, 74 Idaho 65, 256 P.2d 787 (1953).

Partnerships.

Where pleadings disclosed that primary purpose of complaint was to secure a determination of relation as a partnership and its dissolution thereof, and relief as to real estate held by the partnership was incidental, the action was transitory. Jarvis v. Hamilton, 73 Idaho 131, 246 P.2d 216 (1952).

Proper venue for determination of partnership matters is in the county where the partners reside not where the assets are held, even though part of the assets are real estate. Jarvis v. Hamilton, 73 Idaho 131, 246 P.2d 216 (1952).

Personal Injuries.

Where a cause of action for personal injuries arose in a different county from that of the defendant's residence, and the majority of the witnesses resided therein, plaintiff could have case retransferred there. Spaulding v. Hoops, 49 Idaho 289, 287 P. 947 (1930).

Promissory Notes.

Residence of defendant at time of commencement of action is only test for determining venue of action to enforce payment of promissory note. McCarty v. Herrick, 41 Idaho 529, 240 P. 192 (1925).

Real Estate Interest.

If real estate interest alleged is only incidental to equitable relief requested, the action is transitory. Jarvis v. Hamilton, 73 Idaho 131, 246 P.2d 216 (1952).

Securities.

In a securities case brought by the shareholders against the corporation and its representatives, alleging fraud, venue was proper in the county where the offer to sell was made and the shares were sold. Hayes v. Kingston, 140 Idaho 551, 96 P.3d 652 (2004).

Venue.

It is the defendant's residence at the commencement of a suit that fixes the venue in a county. McCarty v. Herrick, 41 Idaho 529, 240 P. 192 (1925).

Determination of motion of change of venue under this section is within sound discretion of trial court, which will not be disturbed unless discretion is abused. Jarvis v. Hamilton, 73 Idaho 131, 246 P.2d 216 (1952).

Phrase "where the cause of action arose" in a fraud case means venue lies where the misrepresentation was made or heard, or where the injury occurred. In a security case, the phrase means venue lies where the offer to sell was made or where the securities were sold. Hayes v. Kingston, 140 Idaho 551, 96 P.3d 652 (2004).

The provision in this section, which sets forth that an action is to be tried in the county in which defendants "or some of them reside", does not mandate that venue is proper only in counties where more than one defendant resides; where there are multiple defendants, it is permissible to base venue in the county of the residence of any one of them against whom substantial relief is sought. Pintlar Corp. v. Bunker Ltd. Partnership, 117 Idaho 152, 786 P.2d 543 (1990).

Cited in: Guynn v. McDaneld, 4 Idaho 605, 43 P. 74 (1895); Stephan v. Hoffman, 86 Idaho 304, 386 P.2d 56 (1963); Priest Lake Coalition, Inc. v. State ex rel. Evans, 111 Idaho 354, 723 P.2d 898 (1986); Burton v. Atomic Workers Fed. Credit Union, 119 Idaho 17, 803 P.2d 518 (1990); Lohman v. Flynn, 139 Idaho 312, 78 P.3d 379 (2003).

RESEARCH REFERENCES

Am. Jur. — 44A Am. Jur. 2d, Insurance, § 1905.
77 Am. Jur. 2d, Venue, § 24 et seq.
C.J.S. — 19 C.J.S., Corporations, § 798 et seq.
46 C.J.S., Insurance, §§ 1764, 1765.
92A C.J.S., Venue, §§ 79 to 126.
A.L.R. — National bank's waiver of statutory right to be sued in district where established or in which it is located. 1 A.L.R.3d 904.

5-405. Improper venue — Proceedings. [Repealed.]

STATUTORY NOTES

Compiler's Notes.
This section, which comprised C.C.P. 1881, § 209; R.S., R.C., & C.L., § 4124; C.S., § 6665; I.C.A., § 5-405, was repealed by S.L. 1975, ch. 242, § 1, effective March 31, 1975. For present rule, see Idaho Civil Procedure Rules 12(b), 12(h), 40(e).

5-406. Change of venue — When granted. [Repealed.]

STATUTORY NOTES

Compiler's Notes.
This section, which comprised C.C.P. 1881, § 210; R.S. & R.C., § 4125; am. 1913, ch. 96, § 1, p. 385; reen. C. L., § 4125; C.S., § 6666; I.C.A., § 5-406, was repealed by S.L. 1975, ch. 242, § 1, effective March 31, 1975. For present rule, see Idaho Civil Procedure Rule 40(e).

5-407. Selection of new venue — Procedure when judge disqualified. [Repealed.]

STATUTORY NOTES

Compiler's Notes.
This section, which comprised R.S., § 4126; am. 1907, p. 578, § 1; reen. R.C. & C.L., § 4126; C.S., § 6667; I.C.A., § 5-407; am. 1933, ch. 182, § 1, p. 337; am. 1969, ch. 114, § 1, p. 371; am. 1970, ch. 118, § 1, p. 281, was repealed by S.L. 1975, ch. 242, § 1. For present rule, see Idaho Civil Procedure Rules 40(d)(5) and 40(e).

5-408. Transmission of papers — Costs of filing papers anew — Jurisdiction in new venue — Payment of county expenses. — (1) When an order is made transferring an action or proceeding for trial, the clerk of the court must transmit the pleadings and papers therein to the clerk of the court to which it is transferred. Any fee therefor as provided by law shall be paid by the party at whose instance the order was made. The court to which an action or proceeding is transferred has and exercises over

the same like jurisdiction as if it had been originally commenced therein.

(2) When an action is transferred from a county because there is reason to believe that an impartial trial cannot be had therein, or that the convenience of witnesses and the ends of justice would be promoted by the transfer, the costs and expenses accruing upon such removal and trial are a charge against the county from which the action was removed. The clerk of the court in the county to which the action is removed must certify the amount of said expenses to the auditor of the proper county, which must be allowed and paid as other county charges.

History.
C.C.P. 1881, § 212; R.S., R.C., & C.L., § 4127; C.S., § 6668; am. 1925, ch. 125, § 1, p. 171; I.C.A., § 5-408; am. 1969, ch. 114, § 2, p. 371; am. 1993, ch. 83, § 1, p. 213.

STATUTORY NOTES

Effective Dates.
Section 3 of S.L. 1969, ch. 114 provided that the act should become effective at 12:01 a.m. on January 11, 1971.

Section 2 of S.L. 1993, ch. 83 read: "This act shall be in full force and effect on and after July 1, 1993, and shall apply to costs and expenses incurred after this date."

JUDICIAL DECISIONS

Review on Appeal.
On appeal from order granting change of venue, transcript may be made and certified by clerk of court from which change was granted. Ondes v. Bunker Hill & Sullivan Mining Concentrating Co., 37 Idaho 570, 218 P. 364 (1923).

RESEARCH REFERENCES

Am. Jur. — 77 Am. Jur. 2d, Venue, § 65.
C.J.S. — 92A C.J.S., Venue, §§ 290 to 292, 300.

5-409. Actions affecting real estate — Proceedings after judgment. — When an action or proceeding affecting the title to or possession of real estate has been brought in or transferred to any court of a county other than the county in which the real estate, or some portion of it, is situated, the clerk of such court must, after final judgment therein, certify, under his seal of office, and transmit to the corresponding court of the county in which the real estate affected by the action is situated, a copy of the judgment. The clerk receiving such copy must file, docket and record the judgment in the records of the court, briefly designating it as a judgment transferred from _____ court (naming the proper court).

History.
C.C.P. 1881, § 213; R.S., R.C., & C.L., § 4128; C.S., § 6669; I.C.A., § 5-409.

STATUTORY NOTES

Compiler's Notes.
The words enclosed in parentheses so appeared in the law as enacted.

CHAPTER 5

COMMENCEMENT OF ACTIONS

5-501. Actions commenced by filing complaint. [Repealed.]

STATUTORY NOTES

Compiler's Notes.
This section, which comprised C.C.P. 1881, § 214; R.S., R.C., & C.L., § 4138; C.S., § 6670; am. 1927, ch. 54, § 1, p. 68; I.C.A., § 5-501, was repealed by S.L. 1975, ch. 242, § 1, effective March 31, 1975. For present rule, see Idaho Civil Procedure Rule 3(a).

5-502. Issuance of summons. [Repealed.]

STATUTORY NOTES

Compiler's Notes.
This section, which comprised C.C.P. 1881, § 215; R.S., § 4139; am. 1895, p. 139, § 1; reen. 1899, p. 271, § 1; reen. R.C. & C.L., § 4139; C.S., § 6671; am. 1927, ch. 93, § 1, p. 119; I.C.A., § 5-502, was repealed by S.L. 1975, ch. 242, § 1, effective March 31, 1975. For present rule, see Idaho Civil Procedure Rule 4(a).

5-503. Forms of substance. [Repealed.]

STATUTORY NOTES

Compiler's Notes.
This section, which comprised C.C.P. 1881, § 216; R.S., § 4140; am. 1907, p. 537, § 1; reen. R.C., § 4140; am. 1913, ch. 87, § 1, p. 361; reen. C.L., § 4140; C.S., § 6672; am. 1921, ch. 154, § 1, p. 346; am. 1927, ch. 93, § 2, p. 119; I.C.A., § 5-503, was repealed by S.L. 1975, ch. 242, § 1, effective March 31, 1975. For present rule, see Idaho Civil Procedure Rules 4(b), 4(e)(1).

5-504. Another summons. [Repealed.]

STATUTORY NOTES

Compiler's Notes.
This section, which comprised C.C.P. 1881, § 217; R.S. & R.C., § 4141; am. 1911, ch. 110, § 1, p. 366; reen. C.L., § 4141; C.S., § 6673; am. 1927, ch. 93, § 3, p. 119; I.C.A., § 5-504, was repealed by S.L. 1975, ch. 242, § 1, effective March 31, 1975. For present rule, see Idaho Civil Procedure Rule 4(a).

5-505. Lis pendens. — In an action affecting the title or the right of possession of real property, the plaintiff at the time of filing the complaint, and the defendant at the time of filing his answer, when affirmative relief is

claimed in such answer, or at any time afterward, may file for record with the recorder of the county in which the property or some part thereof is situated, a notice of the pendency of the action, containing the names of the parties, the object of the action or defense, and a description of the property in that county affected thereby. From the time of filing such notice for record only shall a purchaser or incumbrancer of the property affected thereby be deemed to have constructive notice of the pendency of the action, and only of its pendency against parties designated by their real names.

History.
C.C.P. 1881, § 218; R.S., R.C., & C.L., § 4142; C.S., § 6674; I.C.A., § 5-505.

STATUTORY NOTES

Cross References.
Notices of pendency of actions affecting real estate or title or possession to be recorded by county recorder, § 31-2402; index, § 31-2404.
Partition of real estate, filing of lis pendens in actions for, § 6-504.
Sheriff's fee for making return of process, § 31-3203.

Compiler's Notes.
This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

JUDICIAL DECISIONS

Analysis

Effect of lis pendens.
Equity affecting third party purchaser.
Foreclosure of mechanic's lien.
Knowledge of third party interest.
Pending appeal.
Purpose.
Removal from record.
Third-party acquisition before notice.
Unnecessary in case of actual notice.

Effect of Lis Pendens.
Person having no interest in mortgaged premises sought to be foreclosed prior to filing of lis pendens, other than right to burial ground, is bound by foreclosure sale. Noble v. Harris, 33 Idaho 401, 195 P. 543 (1921).
Injunction to prevent sales of water will attach to right of irrigation company acquired by foreclosure before filing of lis pendens in injunction suit. Idaho Irrigation Co. v. Gooding, 265 U.S. 518, 44 S. Ct. 618, 68 L. Ed. 1157 (1924).
The filing of a lis pendens may highlight a possible legal problem affecting the property, thereby inducing an extra measure of caution by potential purchasers or lenders until the litigation is concluded, but this does not mean that any underlying legal rights have been altered. Jerry J. Joseph C.L.U. Ins. Assocs. v. Vaught, 117 Idaho 555, 789 P.2d 1146 (Ct. App. 1990).

Equity Affecting Third Party Purchaser.
Where a third party purchaser from defendant may have relied on plaintiff's long continued recognition of timber deed to defendant, this presents a strong enough appeal to equity that full rescission will not be allowed so as to require the operation of this section and adversely affect third party purchaser. Morrow v. Wm. Berklund Forest Prod. Co., 81 Idaho 428, 346 P.2d 623 (1959).

Foreclosure of Mechanic's Lien.
It is necessary to file a lis pendens in connection with an action to foreclose a mechanic's lien in order to give constructive notice of the foreclosure of the lien beyond the six-month period required for commencing such action. Credit Bureau of Lewiston-Clarkston, Inc. v. Idaho First Nat'l Bank, 117 Idaho 29, 784 P.2d 885 (1989).

Knowledge of Third Party Interest.

Since plaintiffs in condemnation proceeding had actual knowledge of appellants' interest in property, it was incumbent on them to join appellants as parties defendant so that the latter might present their case to the trial court; upon plaintiffs failure to do so, it was an abuse of discretion for the trial court to refuse to set aside appellants' default, reopen the case and permit appellants to submit proof, including presentation of evidence as to severance damages. Rich v. Wylie, 84 Idaho 58, 367 P.2d 763 (1962).

Pending Appeal.

Where the purchasers were in possession of the property and the vendor's main concern was the transfer of the property to a bona fide purchaser during pendency of an appeal, the appropriate method the vendors should have followed to protect their interest in the property was the filing of a lis pendens on the property. Suitts v. First Sec. Bank, 100 Idaho 555, 602 P.2d 53 (1979).

Purpose.

A lis pendens is a notice to the world of the existence of a claim affecting certain real property. Jerry J. Joseph C.L.U. Ins. Assocs. v. Vaught, 117 Idaho 555, 789 P.2d 1146 (Ct. App. 1990).

Removal from Record.

Where formal notices of lis pendens operated in the nature of recorded liens on property, yet it was clear from the record that none of the property which had been so encumbered was involved in the actions against property owners, the doctrine of lis pendens was wholly inapplicable and the liens and lis pendens were dissolved and ordered expunged from the record. Eismann v. Miller, 101 Idaho 692, 619 P.2d 1145 (1980).

The removal of a lis pendens, as the result of a settlement or judgment, has no effect on legal rights; it simply is a signal that a dispute over those rights has been resolved. Jerry J. Joseph C.L.U. Ins. Assocs. v. Vaught, 117 Idaho 555, 789 P.2d 1146 (Ct. App. 1990).

Third-Party Acquisition Before Notice.

If a third-party acquires rights to property before receiving actual notice that an action affecting the property has been filed, or before a notice of lis pendens has been filed, the third-party is not bound by the subsequent judgment or decree entered in the action, unless it is made a party to the action. Sartain v. Fidelity Fin. Servs., Inc., 116 Idaho 269, 775 P.2d 161 (Ct. App. 1989).

Unnecessary in Case of Actual Notice.

The filing of a lis pendens is necessary only for the purpose of giving record notice to subsequent purchasers or incumbrancers of the property, who do not have actual knowledge of the action or of the claim upon which it is based; one who has actual knowledge is not entitled to insist that the filing of a lis pendens was necessary. Smith v. Faris-Kesl Constr. Co., 27 Idaho 407, 150 P. 25 (1915).

When a subsequent purchaser or encumbrancer has actual knowledge of an action affecting its right or interest in real property, a notice of lis pendens need not be filed by the party advancing the claim. Sartain v. Fidelity Fin. Servs., Inc., 116 Idaho 269, 775 P.2d 161 (Ct. App. 1989).

Cited in: Federal Land Bank v. Bissonnette, 51 Idaho 219, 4 P.2d 364 (1931).

RESEARCH REFERENCES

Am. Jur. — 51 Am. Jur. 2d, Lis Pendens, § 1 et seq.

C.J.S. — 54 C.J.S., Lis Pendens, § 1 et seq.

A.L.R. — Propriety of filing of lis pendens in action affecting lease hold interest. 67 A.L.R.3d 747.

5-506. Summons — Issuance and return. [Repealed.]

STATUTORY NOTES

Compiler's Notes.

This section, which comprised C.C.P. 1881, § 219; R.S., R.C., & C.L., § 4143; C.S., § 6675; I.C.A., § 5-506, was repealed by S.L. 1975, ch. 242, § 1, effective March 31, 1975. For present rule, see Idaho Civil Procedure Rules 4(c)(1) to 4(c)(3), 4(d)(1) to 4(d)(6), 4(f), 4(g).

5-507. Manner of service. [Repealed.]

STATUTORY NOTES

Compiler's Notes.

This section, which comprised R.S., § 4144; am. 1897, p. 13, § 1; reen. 1899, p. 293, § 1; am. 1907, p. 319, § 1; reen. R.C., § 4144; am. 1909, p. 185, § 1; compiled and reen. C.L., § 4144; C.S., § 6676; I.C.A., § 5-507, was repealed by S.L. 1975, ch. 242, § 1, effective March 31, 1975. For present rule, see Idaho Civil Procedure Rules 4(d)(1) to 4(d)(6).

5-508. Service by publication — Affidavit. — When the person on whom the service is to be made resides outside of the state, or has departed from the state, or cannot after due diligence be found within the state, or conceals himself therein to avoid the service of summons, or is a foreign corporation having no managing or business agent, cashier or secretary within this state, or where any persons are made defendant by the style and description of unknown owners, or unknown heirs or unknown devisees of any deceased person and the names of such unknown owners or heirs or devisees are unknown to the complainant in the action, and such facts appear by affidavit to the satisfaction of the court in which the suit is pending, and it also appears by the verified complaint on file that a cause of action exists against defendant in respect to whom the service is to be made, and that he is a necessary or proper party to the action, the court may make an order for the publication of the summons, or, if the address of the defendant outside of the state is known, may make an order that personal service of the summons may be made outside of the state in lieu of such publication; and an affidavit setting forth in ordinary and concise language any of the grounds as above set forth, upon which the publication of the summons is sought, shall be sufficient without setting forth or showing what efforts have been made or what diligence has been exerted in attempting to find the defendant.

History.

C.C.P. 1881, § 221; R.S., § 4145; am. 1907, p. 319, § 2; reen. R.C., § 4145; am. 1909, p. 185, § 2; am. 1911, ch. 29, § 1, p. 65; reen. C.L., § 4145; C.S., § 6677; am. 1925, ch. 43, § 1, p. 60; am. 1927, ch. 93, § 4, p. 119; I.C.A., § 5-508; am. 1993, ch. 89, § 1, p. 217.

STATUTORY NOTES

Cross References.

Change of name, notice of hearing of petition, § 7-803.

Effect of judgments and decrees when parties served by publication, § 5-326.

Manner of service, § 5-509.

Partition, publication of summons, § 6-506.

Pleadings, designation of unknown party, Idaho Civil Procedure Rule 10(a)(4).

Pleading special matters, unknown parties, Idaho Civil Procedure Rule 9(a).

Unknown owners or heirs as parties, § 5-326; Idaho Civil Procedure Rule 17(d).

Compiler's Notes.

This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

The subject matter of at least a part of this section appears to have been abrogated, affected or covered by Idaho Rules of Civil Procedure, Rules 4(e)(1) and 4(e)(2).

JUDICIAL DECISIONS

ANALYSIS

Child Support Proceedings.

Since Idaho statutes authorized substitute service in an action against a nonresident for debt, and service being essential to the maintenance of such an action, the court did not err in denying the motion to quash service of summons secured by substitute service on a nonresident husband in an action by divorced wife to recover past due installments of child support on the ground that the action was not in rem. Skillern v. Ward, 79 Idaho 350, 317 P.2d 1050 (1957).

Construction in General.

This section is strictly construed and compliance therewith must be exact. Strode v. Strode, 6 Idaho 67, 52 P. 161 (1898), overruled on other grounds, Nixon v. Tongren, 33 Idaho 287, 193 P. 731 (1920). But see Mills v. Smiley, 9 Idaho 317, 76 P. 783 (1903).

Resort to publication can be had only when it is impracticable to obtain personal service. Bear Lake County v. Budge, 9 Idaho 703, 75 P. 614 (1904).

Constructive service of summons on residents of the state cannot be had, nor provision therefor provided by legislation. Bear Lake County v. Budge, 9 Idaho 703, 75 P. 614 (1904).

Divorce Actions.

Divorce actions fall within the purview of the law allowing service of summons by publication, but strict compliance is demanded in such actions; these actions are classified as actions in rem, since the marital status is the res. Gorges v. Gorges, 42 Idaho 357, 245 P. 691 (1926).

Due Diligence.

This section does not dispense with the use of due diligence to ascertain the residence or post-office address of the defendant, and the mere assertion of diligence in the affidavit is not a compliance with the statute. Lohr v. Curley, 27 Idaho 739, 152 P. 185 (1915).

Jurisdiction.

Where, in an action in justices' court to recover money judgment from a nonresident, the court was without jurisdiction until an amendment was filed waiving all claim in excess of the jurisdictional amount, service of process based on an order of publication made prior to the date of the amendment was void, and the amendment, without ensuing legal initial service of process, was unavailing as acquiring jurisdiction of defendant. Aker v. Silbaugh, 62 Idaho 539, 113 P.2d 814 (1941).

Nonresident Insane Person.

Service of summons on guardian ad litem and county attorney in proceedings against nonresident insane person is not compliance with this section, but merely additional to it. Gorges v. Gorges, 42 Idaho 357, 245 P. 691 (1926).

Personal Service in Lieu of Publication.

Existence of verified complaint on file, stating cause of action against defendant against whom service is sought, is essential prerequisite to issuance of order for personal service outside state. Elliott v. Wirth, 34 Idaho 797, 198 P. 757 (1921).

Personal service outside state, when ordered, is in lieu of publication and same proof is necessary in case of default based upon such service. Portland Cattle Loan Co. v. Gemmell, 41 Idaho 756, 242 P. 798 (1925).

Requirements of Affidavit.

An affidavit for publication which describes as the basis of the action a cause of action different from the one alleged in the complaint cannot be made the basis for an order for publication, and an order for publication and publication of summons under such order are void and do not give an absent defendant constructive notice of the pendency of the action. Vermont Loan & Trust Co. v. McGregor, 5 Idaho 510, 51 P. 104 (1897).

An affidavit for publication should show whether the defendant is a resident or nonresident of the state and his last place of residence, if known, and if such place is unknown, that fact should also appear. Mills v. Smiley, 9 Idaho 317, 76 P. 783 (1904).

Sufficiency of Publication.

Where an order for publication of summons was made on August 1, in a justice court in an

action to recover a money judgment against a nonresident defendant, and the only compliance was by registered mail to defendant on August 1 and 23, the justice court did not acquire jurisdiction by publication of summons. Aker v. Silbaugh, 62 Idaho 539, 113 P.2d 814 (1941).

For persons engaged in actionable conduct who subsequently move, leaving no forwarding address by which their whereabouts may be determined, service of summons by publication in a newspaper of general circulation in the area and mailing of copies of the summons and complaint to that party's last known address is reasonably calculated under all the circumstances to apprise that party of the pendency of an action and does not violate due process. Evans v. Galloway, 108 Idaho 711, 701 P.2d 659 (1985).

Validity of Judgment.

Sections 8-501, 8-502 and this section clearly authorized an action against a nonresident, and attachment of his property within the state for the satisfaction of a debt owing to the plaintiff and a judgment in favor of the plaintiff in such an action based upon substituted service is valid and enforceable to extent of the value of the properties seized. Skillern v. Ward, 79 Idaho 350, 317 P.2d 1050 (1957).

Cited in: Whitley v. Spokane & I.E.R.R., 23 Idaho 642, 132 P. 121 (1913); Kivett v. Crouch, 61 Idaho 536, 104 P.2d 21 (1940); Lucky Five Mining Co. v. H. & H. Mines, Inc., 75 Idaho 423, 273 P.2d 676 (1954); Brown's Tie & Lumber Co. v. Kirk, 109 Idaho 589, 710 P.2d 18 (Ct. App. 1985).

RESEARCH REFERENCES

Am. Jur. — 62B Am. Jur. 2d, Process, § 222 et seq.

C.J.S. — 72 C.J.S., Process, § 16 et seq.

5-509. Order of service. — The order must direct the publication to be made in a newspaper to be designated as most likely to give notice to the person to be served, at least once a week for four (4) consecutive weeks.

In case publication is ordered where the residence of a nonresident or absent defendant is known, the clerk must direct a copy of the summons and complaint to be deposited within ten (10) days in any post-office, directed to the person to be served at his last known post-office address. When publication is ordered and made the service of summons is complete at the expiration of the period of publication. When personal service of summons is ordered and made outside of the state the service is complete at the time of service.

History.

C.C.P. 1881, § 222; R.S. & R.C., § 4146; am. 1909, p. 185, § 3; reen. C.L., § 4146; C.S., § 6678; am. 1925, ch. 43, § 2, p. 60; am. 1927, ch. 93, § 5, p. 119; I.C.A., § 5-509; am. 1957, ch. 137, § 1, p. 229.

STATUTORY NOTES

Cross References.

Daily newspaper defined, § 60-107; may designate day for publication of notices, § 60-108.

Publication of notices, § 60-109.

Qualifications of newspapers publishing legal notices, § 60-106.

Rates for official notices, § 60-105.

Unknown owners, heirs, devisees as parties, § 5-326.

Compiler's Notes.

This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

The subject matter of this section appears to have been abrogated, affected or covered at least in part by Idaho Rules of Civil Procedure, Rule 4(e)(1).

Effective Dates.

Section 3 of S.L. 1957, ch. 137 declared an emergency. Approved March 7, 1957.

JUDICIAL DECISIONS

ANALYSIS

Duration of publication.
Motion to quash service.
Order must direct mailing.
Substantial compliance.

Duration of Publication.

The month contemplated by this section is a calendar month and not a lunar month, but a publication for five consecutive weeks at intervals of a week is sufficient. Forsman v. Bright, 8 Idaho 467, 69 P. 473 (1902) (decided prior to 1909 amendment).

Where the order for publication of summons directed that publication be made "at least once a week for one full month" and the summons is published in a weekly newspaper for five consecutive weeks, the first publication being made on September 16 and the last publication October 14 following, the requirement of this section was complied with. Harpold v. Doyle, 16 Idaho 671, 102 P. 158 (1908) (decided prior to 1909 amendment).

Where an order for publication of summons was made on August 1, in a justice court in an action to recover a money judgment against a nonresident defendant, and the only compliance was by registered mail to defendant on August 1 and 23, justice court did not acquire jurisdiction by publication of summons. Aker v. Silbaugh, 62 Idaho 539, 113 P.2d 814 (1941).

Motion to Quash Service.

Since Idaho statutes authorized substitute service in an action against a nonresident for debt, and service being essential to the maintenance of such an action, the court did not err in denying the motion to quash service of summons secured by substitute service on a nonresident husband in an action by divorced wife to recover past due installments of child support on the ground that the action was not in rem. Skillern v. Ward, 79 Idaho 350, 317 P.2d 1050 (1957).

Order Must Direct Mailing.

In order to obtain jurisdiction, the order for publication must direct copies to be mailed to the defendant, if his address is known. Mills v. Smiley, 9 Idaho 317, 76 P. 783 (1903).

Substantial Compliance.

Statutory requirements authorizing service by publication must receive substantial compliance. Mills v. Smiley, 9 Idaho 325, 76 P. 783 (1904); McKnight v. Grant, 13 Idaho 629, 92 P. 989 (1907).

The proceedings of courts of general jurisdiction, where the summons is served by publication, are supported by the same presumptions as where the service is personally made and cannot be avoided for mere errors or irregularities. Harpold v. Doyle, 16 Idaho 671, 102 P. 158 (1908).

Cited in: Whitley v. Spokane & I.E.R.R., 23 Idaho 642, 132 P. 121 (1913); Dawson v. Mead, 98 Idaho 1, 557 P.2d 595 (1976); Evans v. Galloway, 108 Idaho 711, 701 P.2d 659 (1985).

RESEARCH REFERENCES

Am. Jur. — 62B Am. Jur. 2d, Process, § 232 et seq.

C.J.S. — 72 C.J.S., Process, § 89 et seq.

5-510. Service on one of joint defendants. — When the action is against two (2) or more defendants jointly or severally liable on a contract and the summons is served on one (1) or more but not on all of them, the plaintiff may proceed against the defendants served in the same manner as if they were the only defendants.

History.

C.C.P. 1881, § 223; R.S., R.C., & C.L., § 4147; C.S., § 6679; I.C.A., § 5-510.

STATUTORY NOTES

Cross References.

Joinder of parties, Idaho Civil Procedure Rules 19(a)(1) to 19(b), 20(a).

Compiler's Notes.

This section was made a rule of procedure and practice for the courts of Idaho by order of

the Supreme Court promulgated March 19, 1951 which order was rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

JUDICIAL DECISIONS

Cited in: Shumake v. Shumake, 17 Idaho 649, 107 P. 42 (1910); Bonham Nat'l Bank v. Grimes Pass Placer Mining Co., 18 Idaho 629, 111 P. 1078 (1910).

RESEARCH REFERENCES

Am. Jur. — 62B Am. Jur. 2d, Process, § 7.
C.J.S. — 72 C.J.S., Process, §§ 53, 54.

5-511. Proof of service. [Repealed.]

STATUTORY NOTES

Compiler's Notes.
This section, which comprised C.C.P. 1881, § 224; R.S. & R.C., § 4148; am. 1909, p. 185, § 4; reen. C.L., § 4148; C.S., § 6680; I.C.A., § 5-511, was repealed by S.L. 1975, ch. 242, § 1, effective March 31, 1975. For present rule, see Idaho Civil Procedure Rules 4(d)(6), 4(g).

5-512. Jurisdiction acquired by service. [Repealed.]

STATUTORY NOTES

Compiler's Notes.
This section, which comprised C.C.P. 1881, § 225; R.S., R.C., & C.L., § 4149; C.S., § 6681; I.C.A., § 5-512, was repealed by S.L. 1975, ch. 242, § 1. For present rule, see Idaho Civil Procedure Rule 4(i).

5-513. Summons against nonresident owner of public utility — Lien of judgment. — Where any suit has been commenced in any court of this state upon any cause of action arising therein against any nonresident, firm or person engaged in the ownership and control of any electric light or water system or other public utility in this state, and where the cause of action arises out of some matter connected with the carrying on and conducting of said utility the summons therein may be served by delivering a copy thereof attached to a copy of the complaint on file to the person in charge or control of said public utility in this state, or to some agent, cashier or clerk in charge of any office of said firm or person in this state used in the carrying on and conducting of such business.

Any judgment rendered in such action shall become a lien upon and bind all the property of such firm or person used in the carrying on and conducting of such electric light or water system or other public utility.

History.
1913, ch. 63, §§ 1, 2, p. 298; reen. C.L., § 4150; C.S., § 6682; I.C.A., § 5-513.

STATUTORY NOTES

Compiler's Notes.
This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was rescinded by order of the Supreme Court promulgated October 24,

1974, effective January 1, 1975.

The subject matter of this section appears to have been abrogated, affected or covered at least in part by Idaho Rules of Civil Procedure, Rule 4(d)(4).

RESEARCH REFERENCES

C.J.S. — 72 C.J.S., Process, § 70 et seq.

A.L.R. — Attorney representing foreign corporation and litigation as its agent for service of process in unconnected actions or proceedings. 9 A.L.R.3d 738.

Who is "general" or "managing" agent of foreign corporation under statute authorizing service of process on such agent. 17 A.L.R.3d 625.

5-514. Acts subjecting persons to jurisdiction of courts of state. — Any person, firm, company, association or corporation, whether or not a citizen or resident of this state, who in person or through an agent does any of the acts hereinafter enumerated, thereby submits said person, firm, company, association or corporation, and if an individual, his personal representative, to the jurisdiction of the courts of this state as to any cause of action arising from the doing of any of said acts:

(a) The transaction of any business within this state which is hereby defined as the doing of any act for the purpose of realizing pecuniary benefit or accomplishing or attempting to accomplish, transact or enhance the business purpose or objective or any part thereof of such person, firm, company, association or corporation;

(b) The commission of a tortious act within this state;

(c) The ownership, use or possession of any real property situate within this state;

(d) Contracting to insure any person, property or risk located within this state at the time of contracting;

(e) The maintenance within this state of matrimonial domicile at the time of the commission of any act giving rise to a cause of action for divorce or separate maintenance;

(f) The engaging in an act of sexual intercourse within the state, giving rise to a cause of action for paternity under chapter 11, title 7, Idaho Code. The provisions of this subsection shall apply retroactively, and for the benefit of any dependent child, whether born before or after the effective date of this act, and regardless of the past or current marital status of the parents of the child.

History.

1961, ch. 153, § 1, p. 224; am. 1969, ch. 236, § 1, p. 749; am. 1988, ch. 106, § 1, p. 195.

STATUTORY NOTES

Compiler's Notes.

The words "effective date of this act", in subsection (f), means the effective date of S.L. 1988, ch. 106, which was July 1, 1988.

JUDICIAL DECISIONS

ANALYSIS

Construction.
Construction with other law.

Construction.

Sections 5-514 — 5-517 are designed to provide a forum for Idaho residents and are remedial legislation of the most fundamental nature; therefore, they are to be liberally construed. Doggett v. Electronics Corp. of Am., 93 Idaho 26, 454 P.2d 63 (1969); Duignan v. A.H. Robins Co., 98 Idaho 134, 559 P.2d 750 (1977).

This section is patterned after the Illinois long-arm statute and Illinois decisions may be looked to for persuasive guidance in construing it. Southern Idaho Pipe & Steel Co. v. Cal-Cut Pipe & Supply, Inc., 98 Idaho 495, 567 P.2d 1246 (1977), cert. denied and appeal dismissed, 434 U.S. 1056, 98 S. Ct. 1225, 55 L. Ed. 2d 757 (1978).

Subdivision (a) of this section is designed to provide a forum for in-state residents in a world of increasingly complex commercial transactions and, since it is remedial in nature, should be broadly construed. Southern Idaho Pipe & Steel Co. v. Cal-Cut Pipe & Supply, Inc., 98 Idaho 495, 567 P.2d 1246 (1977), cert. denied and appeal dismissed, 434 U.S. 1056, 98 S. Ct. 1225, 55 L. Ed. 2d 757 (1978).

In order for jurisdiction to be obtained over an out-of-state defendant, the act giving rise to the cause of action must fall within the scope of this state's long-arm jurisdiction and the constitutional standards of due process must be met. Schneider v. Sverdsten Logging Co., 104 Idaho 210, 657 P.2d 1078 (1983).

This section is designed to provide a forum for this state's residents and is to be liberally construed. Beco Corp. v. Roberts & Sons Constr. Co., 114 Idaho 704, 760 P.2d 1120 (1988), overruled on other grounds, by Houghland Farms, Inc. v. Johnson, 119 Idaho 72, 803 P.2d 978 (1990), to the extent it conflicts with Burger King Corp. v. Rudzewicz, 471 U.S. 462, 105 S. Ct. 2174, 85 L. Ed. 2d 528 (1985).

Construction With Other Law.

This section and § 49-2421 do not impliedly repeal § 5-229. Tetzlaff v. Brooks, 130 Idaho 903, 950 P.2d 1242 (1997).

Defendant's Activities.

The fact that plaintiff's place of business was in Idaho had no significance in determining whether Idaho may exercise personal jurisdiction over defendant; it is defendant's activities, not plaintiff's location, that must be considered. Houghland Farms, Inc. v. Johnson, 119 Idaho 72, 803 P.2d 978 (1990).

Trial court erred in denying the Louisiana resident's motion to dismiss the investors' Ponzi scheme lawsuit, because he personally did nothing in Idaho which would have come under the purview of the Idaho long-arm statute, and none of the persons who committed the tortious acts or conducted business in Idaho was his agent. Knutsen v. Cloud, 142 Idaho 148, 124 P.3d 1024 (2005).

Divorce.

The Idaho long-arm statute clothes the district courts with sufficient jurisdiction in a divorce action to render an in personam judgment against a nonappearing defendant on issues of child custody, child support, and attorney fees. Baker v. Baker, 100 Idaho 635, 603 P.2d 590 (1979).

In a divorce action, the demand for child support and attorney fees did not "arise out of" the community's ownership of property in this state; therefore, the presence of community property in this state did not support the exercise of personal jurisdiction. Donaldson v. Donaldson, 111 Idaho 951, 729 P.2d 426 (Ct. App. 1986).

Due Process.

Once plaintiff suing an out-of-state defendant has shown that his cause of action comes within the language of this section, he must meet one other test: would the exercise of jurisdiction by an Idaho court so offend tradi-

tional notions of fair play and substantial justice as to violate out-of-state defendant's constitutional right to due process. Duignan v. A.H. Robins Co., 98 Idaho 134, 559 P.2d 750 (1977).

Where plaintiff had an intrauterine device inserted in California, but the the infection occurred in Idaho, the operation occurred in Idaho, and plaintiff, her physician and surgeon were residents of Idaho, the exercise by Idaho of long-arm jurisdiction over the out-of-state manufacturer of the defective intrauterine device did not violate its right to due process. Duignan v. A.H. Robins Co., 98 Idaho 134, 559 P.2d 750 (1977).

Foreign State as Defendant.

A defendant who is subject to the jurisdiction of the state under the "long arm" provisions of this statute is not considered absent from the state within the meaning of § 5-229. Blankenship v. Myers, 97 Idaho 356, 544 P.2d 314 (1975).

Because jurisdiction refers to the power of a court to decide disputes and to compel parties to come before it, a court in ruling on a motion to dismiss for lack of personal jurisdiction must determine whether it has power to hear the complaint rather than utilize a forum non conveniens analysis. Marco Distrib., Inc. v. Biehl, 97 Idaho 853, 555 P.2d 393 (1976).

Idaho supreme court held personal jurisdiction over state of Washington in tort action by Idaho hospital against Washington where Idaho hospital was required to accept rate established by Washington department of labor and industries for payment of medical services rendered to Washington workers' compensation claimants. Saint Alphonsus Regional Medical Ctr. v. Washington, 123 Idaho 739, 852 P.2d 491 (1993).

In General.

For the purpose of determining the state with jurisdiction as well as the substantive law which will govern, the state where the injury occurred, and the cause of action thus accrued, is generally the most logical state for adjustment of rights, particularly where there are residents of several different states involved. Doggett v. Electronics Corp. of Am., 93 Idaho 26, 454 P.2d 63 (1969).

Intent of Legislature.

The legislature, in adopting §§ 5-514 — 5-517, intended to exercise all the jurisdiction available to the state of Idaho under the due process clause of the United States constitution. Doggett v. Electronics Corp. of Am., 93 Idaho 26, 454 P.2d 63 (1969).

The fact that a party being sued does not have a physical presence in Idaho does not render subdivision (a) of this section inapplicable since this section is intended to confer all the jurisdiction available under the due process clause of the U.S. Constitution; such jurisdiction having been expanded in modern times to cover contacts with a state which fall far short of physical presence. Southern Idaho Pipe & Steel Co. v. Cal-Cut Pipe & Supply, Inc., 98 Idaho 495, 567 P.2d 1246 (1977), cert. denied and appeal dismissed, 434 U.S. 1056, 98 S. Ct. 1225, 55 L. Ed. 2d 757 (1978).

Jurisdiction Over Nonresident Landowner.

Jurisdiction as to any cause of action arising from ownership, use, or possession of any real property within the state is not restricted solely to actions challenging ownership; thus, the trial court had jurisdiction as to a cause of action against a nonresident landowner for breach of an alleged real estate broker's employment contract, since there was a substantial connection between ownership of the land and the cause of action. Tandy & Wood, Inc. v. Munnell, 97 Idaho 142, 540 P.2d 804 (1975).

Nonresident Trustee.

Where the plaintiff trust beneficiary filed a complaint alleging jurisdiction pursuant to this section in a court which was not the court of registration for the trust and the defendant trustee consented to in personam jurisdiction with the knowledge that the complaint dealt with administration of the trust, the court had jurisdiction to order that costs and attorney fees not be charged against the trust since the issue of whether the defendant must pay costs and attorney fees was implicitly before the court under Idaho Civil Procedure Rule 15(b). Rasmuson v. Walker Bank & Trust Co., 102 Idaho 95, 625 P.2d 1098 (1981).

Parent Corporation.

Since stock ownership in itself was not sufficient to charge the parent company with responsibility for acts of the subsidiary, a federal district court did not have personal jurisdiction under this section over parent Utah corporation in suit for trademark infringement and unfair competition, where there was no evidence that the Utah corporation controlled the Washington subsidiary's advertising campaign and where the Utah corporation did not commit any act or consummate any transaction in Idaho from which plaintiff's cause of action arose. Idaho Potato Comm'n v. Washington Potato Comm'n, 410 F. Supp. 171 (D. Idaho 1975).

Personal Jurisdiction.

—Factors to Establish.

In suit against ex-wife and her attorney alleging numerous tort claims against the parties involved in taking custody of child where defendant attorney allegedly had known for 16 months that child was in Idaho before he obtained ex parte custody order in California in order that such order could be

used in Idaho to obtain assistance of Idaho law and officials in obtaining custody of child and where alleged injury to plaintiffs arose out of his acts in procuring such order, Idaho assertion of jurisdiction over defendant was within accord with the constitutional principals of due process and defendant's conduct in procuring such order for use in Idaho was sufficient to establish personal jurisdiction over him. Lake v. Lake, 817 F.2d 1416 (9th Cir. 1987).

Where activities by the principals of a joint venture as agents of each other were business transactions meant to further the joint venture's pecuniary interest, the statutory basis for personal jurisdiction over defendant, who was a principal of the joint venture, was established. State Dep't of Fin. v. Tenney, 124 Idaho 243, 858 P.2d 782 (Ct. App. 1993).

—Failure to Establish.

Where federal district court had jurisdiction over Washington state agency in suit brought by Idaho state agency for trademark infringement and for unfair competition, the court did not have personal jurisdiction over the Washington agency's individual members who were never physically present in Idaho. Idaho Potato Comm'n v. Washington Potato Comm'n, 410 F. Supp. 171 (D. Idaho 1975).

The following acts were not enough to establish personal jurisdiction over broker because they do not show he purposefully availed himself of privilege of conducting activities within the state: 1) corporation for whom broker was procuring loan had principal place of business in state; 2) broker acquired statistical information from banks in state; 3) broker visited state to overlook land to be used as security; and 4) the final loan proposal was secured by land outside the state. Houghland Farms, Inc. v. Johnson, 119 Idaho 72, 803 P.2d 978 (1990).

Where state's only interest was that plaintiff was a resident of Idaho, it would violate due process to subject the department of social services of another state, Missouri, and its employees, to Idaho's jurisdiction, even on the limited issue of enjoining them from falsely reporting to third parties that the plaintiff is indebted for child support. Smalley v. Kaiser, 130 Idaho 909, 950 P.2d 1248 (1997).

—Procedure.

In the absence of personal jurisdiction, service of process under this section is ineffective. Donaldson v. Donaldson, 111 Idaho 951, 729 P.2d 426 (Ct. App. 1986).

Where defendant could have raised the defense of lack of jurisdiction over his person by a pre-answer motion or in the answer itself, his failure to so raise the defense of lack of jurisdiction over his person constituted a waiver of that defense. Quintana v. Quintana, 119 Idaho 1, 802 P.2d 488 (Ct. App. 1990).

A resident of the state could not rely on section 7-1004 to argue that the trial court lacked personal jurisdiction over him, since that section defines the basis for the exercise of personal jurisdiction over nonresidents in proceedings to establish, enforce, or modify a support order or to determine parentage. State Dep't of Health & Welfare ex rel. Oregon v. Conley, 132 Idaho 266, 971 P.2d 332 (Ct. App. 1999).

Products Liability.

If dangerously defective goods are placed in the interstate flow of commerce, those whose negligence created the defect should be prepared to defend themselves wherever injury should occur. Doggett v. Electronics Corp. of Am., 93 Idaho 26, 454 P.2d 63 (1969); Duignan v. A.H. Robins Co., 98 Idaho 134, 559 P.2d 750 (1977).

In action for injuries sustained due to explosion of tire sold by defendant foreign corporation in business of selling tires to retailers in the state, trial court erred in granting summary judgment to defendant on grounds that statute of limitations had run and had not been tolled under § 5-229; plaintiff should have been given the opportunity to show that reasonably diligent efforts had been made to serve the defendant without success so that the statute of limitations had been tolled. Lipe v. Javelin Tire Co., 96 Idaho 723, 536 P.2d 291 (1975).

Where an insurer sued an aircraft parts manufacturer in strict liability or negligence for selling defective switches causing an aircraft to crash, and the manufacturer sold products solely to a non-forum state aircraft builder, knowing that the aircraft were distributed nationally and specifically in the forum state, the court adopted the insurer's version of facts, construed its allegations in a light most favorable to the insurer, and noted the remedial nature of the statute, and found that the insurer showed a prima facie case of jurisdiction under subsection (b). Nat'l Union Fire Ins. Co. v. Aerohawk Aviation, Inc., 259 F. Supp. 2d 1096 (D. Idaho 2003).

Purpose.

The purpose of the legislature in including divorce actions as being within the purview of the long-arm statute was to extend the in personam jurisdiction of the courts of this state in divorce cases over those defendants who were maintaining matrimonial domicile in this state when the cause of action for divorce arose. Baker v. Baker, 100 Idaho 635, 603 P.2d 590 (1979).

The intent of the legislature when enacting this section was to grant state courts all personal jurisdiction available under the due process clause of the United States Constitution. Donaldson v. Donaldson, 111 Idaho 951, 729 P.2d 426 (Ct. App. 1986).

The Idaho legislature, in adopting this section, intended to exercise all the jurisdiction available to the State of Idaho under the due process clause of the United States Constitution; thus, the state and federal limits are coextensive. Lake v. Lake, 817 F.2d 1416 (9th Cir. 1987).

Required Contact.

One contact with Idaho consisting of out-of-state manufacture by out-of-state defendants of boiler components which injured plaintiff in Idaho was sufficient to give Idaho jurisdiction over such defendants in ensuing tort action. Doggett v. Electronics Corp. of Am., 93 Idaho 26, 454 P.2d 63 (1969).

Where plaintiff, while resident of South Dakota, was treated by South Dakota doctor and, after she moved to Idaho, the doctor sent copies of original prescriptions to her in Idaho, the alleged injury by use of drugs did not constitute commission of tort by the doctor within the state of Idaho which would confer jurisdiction under this section. Wright v. Yackley, 459 F.2d 287 (9th Cir. 1972).

For jurisdiction, the physical presence of an out-of-state corporation is not required if an independent contractor representing the out-of-state corporation in the transaction sued upon has been physically present in the state. Intermountain Bus. Forms, Inc. v. Shepard Bus. Forms Co., 96 Idaho 538, 531 P.2d 1183 (1975).

Where the defendant Pennsylvania corporation carried on no activity whatsoever in Idaho and did not even conduct business with an Idaho corporation or resident, the mere fact that the corporation once sold a helicopter to a second Pennsylvania corporation and the helicopter was later purchased by an Idaho corporation and ultimately killed an Idaho resident did not constitute "minimum contacts" within the state of Idaho; and therefore, due process prohibited the exercise of in personam jurisdiction over the defendant corporation. Schneider v. Sverdsten Logging Co., 104 Idaho 210, 657 P.2d 1078 (1983).

Where the evidence showed that the defendant Pennsylvania corporation, whose business was servicing helicopters, had no agents in the state of Idaho, that it had never done business in Idaho, that it had injected no products into the interstate "stream of commerce," and that it had not attempted to serve an Idaho market by means of its advertising, the defendant corporation had insufficient contacts with the state of Idaho for an Idaho court to exercise in personam jurisdiction over it consistent with due process principles. Schneider v. Sverdsten Logging Co., 104 Idaho 210, 657 P.2d 1078 (1983).

The out-of-state defendant corporation had sufficient minimum contacts with this state such that the assertion of jurisdiction was fair, where the defendant deliberately reached out to negotiate with a corporation in this state and executed a contract which established a relationship of some months with the plaintiff, and compelling trial in this state 200 miles from the county seat of the defendant's home office was not unreasonable. Beco Corp. v. Roberts & Sons Constr. Co., 114 Idaho 704, 760 P.2d 1120 (1988), overruled on other grounds, by Houghland Farms, Inc. v. Johnson, 119 Idaho 72, 803 P.2d 978 (1990), to the extent it conflicts with Burger King Corp. v. Rudzewicz, 471 U.S. 462, 105 S. Ct. 2174, 85 L. Ed. 2d 528 (1985).

Mere personal presence in Idaho at one time is not sufficient in and of itself to form the basis for the exercise of specific personal jurisdiction over a person who is later served process outside the state; here there were not sufficient other activities of defendant in Idaho to be enhanced by this one isolated event. Houghland Farms, Inc. v. Johnson, 119 Idaho 72, 803 P.2d 978 (1990).

Tortious Act Within State.

Where plaintiff was injured in Idaho when boiler exploded due to failure of one or both of two components, each manufactured out-of-state by an out-of-state defendant, Idaho court correctly assumed jurisdiction over the cause, notwithstanding only the injury, and not the other aspects of the tortious act, occurred in Idaho. Doggett v. Electronics Corp. of Am., 93 Idaho 26, 454 P.2d 63 (1969).

Where a buyer alleged facts such that, if proven, would entitle him to recover for fraud against an Oregon automobile dealer, but the sales contract was entered into and the vehicle tendered and accepted in Oregon, buyer's injury resulting from fraudulent misrepresentation occurred in Oregon, and such dealer was not subject to the jurisdiction of Idaho courts under this section on the theory that he had committed the tort of fraud within Idaho. Akichika v. Kelleher, 96 Idaho 930, 539 P.2d 283 (1975).

Where plaintiff alleged that she had an intrauterine device inserted in California which resulted in an infection after she had moved to Idaho which necessitated the removal of a fallopian tube, the operation having been performed in Idaho, the facts alleged were sufficient to bring the manufacturer of the intrauterine device within the jurisdiction of the Idaho courts on the grounds that it had allegedly committed a "tortious act within this state." Duignan v. A.H. Robins Co., 98 Idaho 134, 559 P.2d 750 (1977).

The fact that an injury has occurred in the state of Idaho in an allegedly tortious manner is sufficient to invoke the "tortious act" language of subdivision (b) of this section. Schneider v. Sverdsten Logging Co., 104 Idaho 210, 657 P.2d 1078 (1983).

District court had long-arm personal jurisdiction over a Maine-based company, and it's manager, for claims by a customer in Idaho alleging fraud, breach of the implied warranty of merchantability, and breach of an express warranty. Despite defendants' argument that they were never physically in Idaho and could not have acted within the state, the allegedly fraudulent representations were directed at an Idaho resident and the injury occurred in Idaho. Blimka v. My Web Wholesaler, LLC., 143 Idaho 723, 152 P.3d 594 (2007).

Transaction of Business Within State.

An airplane manufacturer who appointed regional distributors, who contracted with dealers within the state, who sold the manufacturer's products and delivered to the purchasers the manufacturer's warranty and who was required to conform to certain accounting standards and advertising programs prescribed by the manufacturer and maintain a supply of parts and tolls for servicing the manufacturer's products was transacting business within the state within the meaning of this section. B.B.P. Ass'n v. Cessna Aircraft Co., 91 Idaho 259, 420 P.2d 134 (1966).

Where plaintiff while resident of South Dakota was treated by South Dakota doctor and, after she moved to Idaho, act of furnishing of copies of original prescriptions to her without charge did not constitute the transaction of business within the state of Idaho such as to confer jurisdiction under this section. Wright v. Yackley, 459 F.2d 287 (9th Cir. 1972).

Where an Oregon automobile dealer advertised a truck in an Oregon newspaper and entered into a sales contract with an Idaho buyer whereby the truck was tendered and accepted in Oregon, the dealer was not transacting business within Idaho for purposes of this section, even though buyer made a phone call from Idaho inquiring about the truck, dealer used an Idaho bank as an agent for transfer of title, and dealer attempted to repossess the truck in Idaho. Akichika v. Kelleher, 96 Idaho 930, 539 P.2d 283 (1975).

In an action on a promissory note executed by an officer of a Michigan corporation, the officer's actions on behalf of the corporation were attributed to him individually, both for purposes of liability and jurisdiction, in the absence of a disclosure by him before execution of the note that he acted as agent for the corporation. Marco Distrib., Inc. v. Biehl, 97 Idaho 853, 555 P.2d 393 (1976).

Where a California corporation had solicited business in Idaho, by means of mail or telephone advertising, for a least 10 years, thereby actively initiating sales transactions with state residents, such corporation had transacted business within the meaning of subdivision (a) of this section and was within the jurisdiction of Idaho courts despite the fact that deliveries of goods were made in California rather than Idaho. Southern Idaho Pipe & Steel Co. v. Cal-Cut Pipe & Supply, Inc., 98 Idaho 495, 567 P.2d 1246 (1977), cert. denied and appeal dismissed, 434 U.S. 1056, 98 S. Ct. 1225, 55 L. Ed. 2d 757 (1978).

Where, in action for breach of contract, warranty and tort duties in manufacture of concrete pouring equipment and forms, it was shown that one defendant sent a service technician to Idaho work site for three days and that the other defendant gave plaintiff instructions in Idaho and its field representative spent a week there conducting tests and making representations in connection with defendant's business, including ordering a new form, the transfer of the entire case to the United States district court in Idaho was proper since all of the events and most of the contract giving rise to the claim occurred in Idaho so that jurisdiction over the person of both defendants was established. Apex Constr., Inc. v. Huron Mfg. Corp., 506 F. Supp. 20 (E.D. Wash. 1980).

Under subdivision (a) of this section, a person is subject to personal jurisdiction in the Idaho state court if he conducts business within the state and the alleged cause of action arises from that conduct of business. Kendall v. Overseas Dev. Corp., 700 F.2d 536 (9th Cir. 1983).

The defendant's conduct of negotiating a contract price with the plaintiff agreeing that the plaintiff should draft the agreement, executing the document over the plaintiff's signature, and mailing the contract back to this state fell within the definition of "transaction of any business within this state"; and the fact that the defendant maintained no physical presence in this state did not affect the applicability of this section. Beco Corp. v. Roberts & Sons Constr. Co., 114 Idaho 704, 760 P.2d 1120 (1988), overruled on other grounds, by Houghland Farms, Inc. v. Johnson, 119 Idaho 72, 803 P.2d 978 (1990), to the extent of conflict with Burger King Corp. v. Rudzewicz, 471 U.S. 462, 105 S. Ct. 2174, 85 L. Ed. 2d 528 (1985).

The acquisition of statistical information by out-of-state defendant loan company, concerning plaintiff corporation, from various banks in Idaho, had no significance in determining whether defendant invoked the benefits and protections of the laws of Idaho, nor did the fact that defendant visited plaintiff's Idaho properties to be able more fully to acquaint himself with the security that would be offered for a potential loan have any such significance. Houghland Farms, Inc. v. Johnson, 119 Idaho 72, 803 P.2d 978 (1990).

Shareholders in Utah corporation involved in purchasing cattle did not conduct business in Idaho, within the meaning of this section

merely by the fact that seller was located in Idaho or by a phone call initiated by the seller in which buyer allegedly guaranteed payment. Mann v. High Country Meats, Inc., 125 Idaho 357, 870 P.2d 1316 (1994).

Based on the corporation's purposefully directed activities in Idaho, the exercise of jurisdiction over the corporation by the director of the department of finance in issuing the cease and desist order was consistent with fair play, and Idaho had personal jurisdiction over the corporation. PurCo Fleet Servs. v. Idaho State Dep't of Fin., 140 Idaho 121, 90 P.3d 346 (2004).

Personal jurisdiction was properly asserted over a Tennessee supplier in an Idaho store's breach of contract suit because the supplier purposefully availed itself of doing business in Idaho. All of its contractual obligations were performed there, including submission of weekly invoices and insurance certificates, as well as compliance with a contractual performance review obligation. Albertson's LLC v. Kleen-Sweep Janitorial Co., 2009 U.S. Dist. LEXIS 105088 (D. Idaho Nov. 9, 2009).

Where there is no applicable federal statute governing personal jurisdiction, the law of the state in which the district court sits applies. Because this section allows a broader application of personal jurisdiction than the Due Process Clause, the court need look only to the Due Process Clause to determine personal jurisdiction. Wells Cargo, Inc. v. Transp. Ins. Co., 676 F. Supp. 2d 1114 (D. Idaho 2009).

Cited in: Jones v. Watson, 98 Idaho 606, 570 P.2d 284 (1977); Schwilling v. Horne, 105 Idaho 294, 669 P.2d 183 (1983); Landis v. Hodgson, 109 Idaho 252, 706 P.2d 1363 (Ct. App. 1985); Nelson v. World Wide Lease, Inc., 110 Idaho 369, 716 P.2d 513 (1986); Idaho v. Bunker Hill Co., 635 F. Supp. 665 (D. Idaho 1986); Sinclair & Co. v. Gurule, 114 Idaho 362, 757 P.2d 225 (Ct. App. 1988); Ponderosa Paint Mfg., Inc. v. Yack, 125 Idaho 310, 870 P.2d 663 (Ct. App. 1994).

OPINIONS OF ATTORNEY GENERAL

Section 32-1008A and this section do not give the state department of health and welfare jurisdiction and authority to collect relative responsibility payments from responsible relatives who do not reside in this state. OAG 85-10.

RESEARCH REFERENCES

Am. Jur. — 62B Am. Jur. 2d, Process, § 158 et seq.

A.L.R. — Products liability: In personam jurisdiction over nonresident manufacturer or seller under "long-arm" statutes. 19 A.L.R.3d 13.

Use of goods: Applicability, to actions not based on product's liability, of state's statutes or rules of court predicating in personam jurisdiction over foreign manufacturers or distributors upon use of their goods within state. 20 A.L.R.3d 957.

Validity, as a matter of due process, of state statutes or rules of court conferring in personam jurisdiction over nonresidents or foreign corporations on the basis of isolated business transaction within state. 20 A.L.R.3d 1201.

Construction and application of state statutes or rules of court predicating in personam jurisdiction over nonresidents or foreign corporations on making or performing a contract within the state. 23 A.L.R.3d 551.

Contracts: Construction and application of state statutes or rules of court predicating in personam jurisdiction over nonresidents or foreign corporations on making or performing a contract within the state. 23 A.L.R.3d 551.

Tort: Construction and application of state statutes or rules of court predicating in personam jurisdiction over nonresidents or foreign corporations on the commission of a tort within this state. 24 A.L.R.3d 532.

Construction and application, as to isolated acts or transactions, of state statutes or rules of court predicating in personam jurisdiction over nonresidents or foreign corporations upon the doing of an act, or upon doing or transacting business or "any" business, within the state. 27 A.L.R.3d 397.

Nonresidential parent: Obtaining jurisdiction over nonresident parent in filiation or support proceeding. 76 A.L.R.3d 708.

5-515. Service of process on persons enumerated in preceding section — Personal service outside state. — Service of process upon any such person, firm, company, association or corporation who is subject to the jurisdiction of the courts of this state, as provided herein, may be made by personally serving the summons upon the defendant outside the state with the same force and effect as though summons had been personally served

within this state.

History.
1961, ch. 153, § 2, p. 224.

STATUTORY NOTES

Cross References.
Service of process, procedure, Idaho Civil Procedure Rules 4(a) to 4(d)(4), 4(d)(6) to 4(i).

Compiler's Notes.
The term "herein" in this section refers to S.L. 1961, ch. 153, which is codified as §§ 5-514 to 5-517.

JUDICIAL DECISIONS

ANALYSIS

Action of manufacturer's warranty.
Husband in divorce.

Action of Manufacturer's Warranty.
A manufacturer whose products, warranted by it, are sold in the state may be subjected to jurisdiction of the courts of the state in an action on such warranty by service of process as prescribed by this section. B.B.P. Ass'n v. Cessna Aircraft Co., 91 Idaho 259, 420 P.2d 134 (1966).

Husband in Divorce.
Where service of process upon the husband was made at a time when he was subject to the jurisdiction of the courts of this state, the service of process made upon him in Oregon had the same force and effect as though summons had been personally served within this state. Baker v. Baker, 100 Idaho 635, 603 P.2d 590 (1979).

RESEARCH REFERENCES

Am. Jur. — 62B Am. Jur. 2d, Process, § 158 et seq.

C.J.S. — 72 C.J.S., Process, § 100 et seq.

5-516. Limitation on causes of action. — Only causes of action arising from acts enumerated herein may be asserted against a defendant in an action in which jurisdiction over such defendant is based upon this section.

History.
1961, ch. 153, § 3, p. 224.

STATUTORY NOTES

Compiler's Notes.
The term "herein" in this section refers to S.L. 1961, ch. 153, which is codified as §§ 5-514 to 5-517.

JUDICIAL DECISIONS

Extent of Jurisdiction.
Jurisdiction acquired on the basis of a tort cannot be utilized to settle all differences between the parties; each cause of action must stand or fall on its own jurisdictional merits. Doggett v. Electronics Corp. of Am., 93 Idaho 26, 454 P.2d 63 (1969).

Cited in: Wright v. Yackley, 459 F.2d 287 (9th Cir. 1972); B.B.P. Ass'n v. Cessna Aircraft Co., 91 Idaho 259, 420 P.2d 134 (1966).

5-517. Service in other manner unaffected. — Nothing herein contained limits or affects the right to service of process in any other manner now or hereafter provided by law.

History.
1961, ch. 153, § 4, p. 224.

STATUTORY NOTES

Compiler's Notes.
The term "herein" in this section refers to S.L. 1961, ch. 153, which is codified as §§ 5-514 to 5-517.

Effective Dates.
Section 5 of S.L. 1961, ch. 153 declared an emergency. Approved March 11, 1961.

JUDICIAL DECISIONS

Cited in: Wright v. Yackley, 459 F.2d 287 (9th Cir. 1972); B.B.P. Ass'n v. Cessna Aircraft Co., 91 Idaho 259, 420 P.2d 134 (1966).

5-518. Service of process in child support matters. — Service of process in an action to establish or enforce a support obligation may be made in the manner prescribed for service of process in a civil action by a duly authorized process server, or by certified mail, return receipt requested. Any uninterested party over the age of eighteen (18) including, but not necessarily limited to, employees of the bureau of child support enforcement [bureau of child support services] and employees of the county prosecuting attorney's office, may serve such process. For the purposes of this section, service by mail shall be completed upon the obligor's receipt of such certified mail. The party or attorney making service by certified mail shall make a return certificate indicating that he complied with the provisions of this statute and attaching a receipt of the mailing signed by the obligor.

History.
I.C., § 5-518, as added by 1987, ch. 36, § 1, p. 59.

STATUTORY NOTES

Compiler's Notes.
The bracketed insertion was added by the compiler to update the state agency name.

CHAPTER 6
PLEADINGS

SECTION.
5-601 — 5-619. [Repealed.]

5-601. Definition of pleadings. [Repealed.]

STATUTORY NOTES

Compiler's Notes.
This section, which comprised C.C.P. 1881, § 226; R.S., R.C., & C.L., § 4160; C.S., § 6683; I.C.A., § 5-601, was repealed by S.L. 1975, ch. 242, § 1, effective March 31, 1975.

5-602. Form and rules relating to pleadings. [Repealed.]

STATUTORY NOTES

Compiler's Notes.
This section, which comprised C.C.P. 1881, § 227; R.S., R.C., & C.L., § 4161; C.S., § 6684; I.C.A., § 5-602, was repealed by S.L. 1975, ch. 242, § 1, effective March 31, 1975. For present rule, see Idaho Civil Procedure Rules 1(a) to 1(c), 7(a), 12(b).

5-603, 5-604. Pleadings enumerated — First pleading is complaint. [Repealed.]

STATUTORY NOTES

Compiler's Notes.
These sections, which comprised C.C.P. 1881, §§ 228, 229; R.S., R.C., & C.L., §§ 4162, 4167; C.S., §§ 6685, 6686; I.C.A., §§ 5-603, 5-604, were repealed by S.L. 1975, ch. 242, § 1, effective March 31, 1975. For present rule, see Idaho Civil Procedure Rules 7(a), 7(c), 12(b).

5-605. Contents of complaint. [Repealed.]

STATUTORY NOTES

Compiler's Notes.
This section, which comprised C.C.P. 1881, § 230; R.S., R.C., & C.L., § 4168; C.S., § 6687; I.C.A., § 5-605, was repealed by S.L. 1975, ch. 242, § 1, effective March 31, 1975. For present rule, see Idaho Civil Procedure Rules 7(b)(2), 8(a)(1), 8(e)(1), 8(e)(2), 9(b), 9(g).

5-606. Joinder of causes. [Repealed.]

STATUTORY NOTES

Compiler's Notes.
This section, which comprised C.C.P. 1881, § 231; R.S. & R.C., § 4169; am. 1913, ch. 23, § 1, p. 92; reen. C.L., § 4169; C.S., § 6688; I.C.A., § 5-606, was repealed by S.L. 1975, ch. 242, § 1, effective March 31, 1975. For present rule, see Idaho Civil Procedure Rules 8(e)(2), 10(b), 18(a).

5-607. Demurrer to complaint — Grounds. [Repealed.]

STATUTORY NOTES

Compiler's Notes.
This section, which comprised C.C.P. 1881, § 232; R.S., R.C., & C.L., § 4174; C.S., § 6689; I.C.A., § 5-607, was repealed by S.L. 1975, ch. 242, § 1, effective March 31, 1975. For present rule see, Idaho Civil Procedure Rules 7(a), 7(c), 8(e)(2), 9(a), 12(b), 12(d), 12(e), 21.

5-608. Form of demurrer. [Repealed.]

STATUTORY NOTES

Compiler's Notes.
This section, which comprised C.C.P. 1881, § 233; R.S., R.C., & C.L., § 4175; C.S., § 6690; I.C.A., § 5-608, was repealed by S.L. 1975, ch. 242, § 1, effective March 31, 1975. For present rule, see Idaho Civil Procedure Rules 7(c), 12(b), 12(e), 12(g).

5-609. Amendment of complaint. [Repealed.]

STATUTORY NOTES

Compiler's Notes.
This section, which comprised C.C.P. 1881, § 234; R.S., R.C., & C.L., § 4176; C.S., § 6691; I.C.A., § 5-609, was repealed by S.L. 1975, ch. 242, § 1, effective March 31, 1975. For present rule, see Idaho Civil Procedure Rules 12(a), 15(a).

5-610. Objections by answer. [Repealed.]

STATUTORY NOTES

Compiler's Notes.
This section, which comprised C.C.P. 1881, § 235; R.S., R.C., & C.L., § 4177; C.S., § 6692; I.C.A., § 5-610, was repealed by S.L. 1975, ch. 242, § 1, effective March 31, 1975. For present rule, see Idaho Civil Procedure Rules 7(c), 8(b), 8(c), 9(a), 12(b).

5-611. When objections deemed waived. [Repealed.]

STATUTORY NOTES

Compiler's Notes.
This section, which comprised C.C.P. 1881, § 236; R.S., R.C., & C.L., § 4178; C.S., § 6693; I.C.A., § 5-611, was repealed by S.L. 1975, ch. 242, § 1, effective March 31, 1975. For present rule, see Idaho Civil Procedure Rules 7(c), 9(a), 12(b), 12(g), 12(h).

5-612. Answer — Contents. [Repealed.]

STATUTORY NOTES

Compiler's Notes.
This section, which comprised C.C.P. 1881, § 237; R.S., R.C., & C.L., § 4183; C.S., § 6694; am. 1925, ch. 10, § 1, p. 12; I.C.A., § 5-612, was repealed by S.L. 1975, ch. 242, § 1, effective March 31, 1975. For present rule, see Idaho Civil Procedure Rules 7(a), 8(b), 8(c), 9(b), 12(b), 13(a), 18(a).

5-613, 5-614. Essentials of counterclaims. [Repealed.]

STATUTORY NOTES

Compiler's Notes.
These sections, which comprised C.C.P. 1881, §§ 238, 239; R.S., R.C., & C.L., §§ 4184, 4185; C.S., §§ 6695, 6696; I.C.A., §§ 5-613, 5-614, were repealed by S.L. 1975, ch. 242, § 1, effective March 31, 1975. For present rule, see Idaho Civil Procedure Rules 7(a), 13(a) to 13(c), 13(e), 18(a).

5-615. Cross demands compensated. [Repealed.]

STATUTORY NOTES

Compiler's Notes.
This section, which comprised C.C.P. 1881, § 240; R.S., R.C., & C.L., § 4186; C.S., § 6695; I.C.A., § 5-615, was repealed by S.L. 1975, ch. 242, § 1, effective March 31, 1975. For present rule, see Idaho Civil Procedure Rule 13(g).

5-616. Separate defenses permitted. [Repealed.]

STATUTORY NOTES

Compiler's Notes.
This section, which comprised C.C.P. 1881, § 241; R.S., R.C., & C.L., § 4187; C.S., § 6698; I.C.A., § 5-616, was repealed by S.L. 1975, ch. 242, § 1, effective March 31, 1975. For present rule, see Idaho Civil Procedure Rules 7(c), 8(b), 8(e)(2), 10(b), 12(b), 13(b), 18(a).

5-617. Affirmative relief — Cross-complaint. [Repealed.]

STATUTORY NOTES

Compiler's Notes.
This section, which comprised C.C.P. 1881, § 242; R.S., R.C., & C.L., § 4188; C.S., § 6699; am. 1927, ch. 58, § 1, p. 71; I.C.A., § 5-617, was repealed by S.L. 1975, ch. 242, § 1, effective March 31, 1975. For present rule, see Idaho Civil Procedure Rules 5(a), 5(c), 7(a), 7(c), 8(a)(1), 8(a)(2), 8(b), 12(a), 12(b), 13(a), 13(c), 13(g), 18(a).

5-618, 5-619. Demurrer to answer. [Repealed.]

STATUTORY NOTES

Compiler's Notes.
These sections, which comprised C.C.P. 1881, §§ 243, 244; R.S., R.C., & C.L., §§ 4193, 4194; C.S., §§ 6700, 6701; I.C.A., §§ 5-618, 5-619, were repealed by S.L. 1975, ch. 242, § 1. For present rules, see Idaho Civil Procedure Rules 7(a), 7(c), 8(e)(2), 12(b), 12(e), 12(f).

CHAPTER 7

SIGNATURE AND VERIFICATION OF PLEADINGS

SECTION.
5-701 — 5-705. [Repealed.]

5-701, 5-702. Pleadings to be signed by resident attorney — Verification. [Repealed.]

STATUTORY NOTES

Compiler's Notes.
These sections, which comprised C.C.P. 1881, § 245; 1905, p. 75, § 1; reen. R.C. & C.L., §§ 4198, 4199; am. 1911, ch. 214, § 1, p. 687; reen. C.L., § 4199; C.S., §§ 6702, 6703; I.C.A., §§ 5-701, 5-702, were repealed by S.L. 1975, ch. 232, § 1, effective March 31, 1975. For present rules, see Idaho Civil Procedure Rules 5(b), 7(b)(2), 11(a)(1) to 11(a)(3), 11(c).

5-703 — 5-705. Genuineness and execution of instruments attached to pleadings — Right to inspect original. [Repealed.]

STATUTORY NOTES

Compiler's Notes.
These sections, which comprised C.C.P. 1881, §§ 246-248; R.S., R.C., & C.L., §§ 4200-4202; C.S., §§ 6704-6706; I.C.A., §§ 5-703 — 5-705, were repealed by S.L. 1975, ch. 242, § 1. For present rule, see Idaho Civil Procedure Rule 36(a).

CHAPTER 8

GENERAL RULES OF PLEADINGS

SECTION.

5-801. Pleading liberally construed. [Repealed.]

STATUTORY NOTES

Compiler's Notes.
This section, which comprised C.C.P. 1881, § 249; R.S., R.C., & C.L., § 4207; C.S., § 6707; I.C.A., § 5-801, was repealed by S.L. 1975, ch. 242, § 1, effective March 31, 1975. For present rule, see Idaho Civil Procedure Rule 8(f).

5-802. Sham and irrelevant matter. [Repealed.]

STATUTORY NOTES

Compiler's Notes.
This section, which comprised C.C.P. 1881, § 250; R.S., R.C., & C.L., § 4208; C.S., § 6708; I.C.A., § 5-802, was repealed by S.L. 1975, ch. 242, § 1, effective March 31, 1975. For present rule, see Idaho Civil Procedure Rule 12(f).

5-803. Pleading an account. [Repealed.]

STATUTORY NOTES

Compiler's Notes.
This section, which comprised C.C.P. 1881, § 251; R.S., R.C., & C.L., § 4209; C.S, § 6709; I.C.A., § 5-803, was repealed by S.L. 1975, ch. 242, § 1, effective March 31, 1975. For present rule, see Idaho Civil Procedure Rule 12(e).

5-804. Pleading written instruments. [Repealed.]

STATUTORY NOTES

Compiler's Notes.
This section, which comprised C.S., § 6709A, as added by 1931, ch. 11, § 1, p. 15; I.C.A., § 5-804, was repealed by S.L. 1975, ch. 242, § 1, effective March 31, 1975. For present rule, see Idaho Civil Procedure Rules 7(c), 10(c), 12(e).

5-805 — 5-811. Pleading written instruments, recovery of real property, judgments, conditions precedent, statute of limitations, private statutes and libel actions. [Repealed.]

STATUTORY NOTES

Compiler's Notes.
These sections, which comprised C.C.P. 1881, §§ 252-258; R.S., R.C., & C.L., §§ 4210-4216; C.S., §§ 6710-6716; I.C.A., §§ 5-805 — 5-811, were repealed by S.L. 1975, ch. 242, § 1, effective March 31, 1975. For present rules, see Idaho Civil Procedure Rules 9(a) to 9(j).

5-812. Uncontroverted allegations of complaint — New matter in answer. [Repealed.]

STATUTORY NOTES

Compiler's Notes.
This section, which comprised C.C.P. 1881, § 259; R.S., R.C., & C.L., § 4217; C.S., § 6717; I.C.A, § 5-812, was repealed by S.L. 1975, ch. 242, § 1, effective March 31, 1975. For present rule, see Idaho Civil Procedure Rules 7(a), 8(b), 8(d), 9(f).

5-813. Material allegation defined. [Repealed.]

STATUTORY NOTES

Compiler's Notes.
This section, which comprised C.C.P. 1881, § 260; R.S., R.C., & C.L., § 4218; C.S., § 6718; I.C.A., § 5-813, was repealed by S.L. 1975, ch. 242, § 1, effective March 31, 1975. For present rule, see Idaho Civil Procedure Rules 8(d), 9(f).

5-814. Supplemental complaint or answer. [Repealed.]

STATUTORY NOTES

Compiler's Notes.
This section, which comprised C.C.P. 1881, § 261; R.S., R.C., & C.L., § 4219; C.S., § 6719; I.C.A., § 5-814, was repealed by S.L. 1975, ch. 242, § 1, effective March 31, 1975. For present rule, see Idaho Civil Procedure Rule 15(d).

5-815. Pleadings subsequent to complaint — Filing and service. [Repealed.]

STATUTORY NOTES

Compiler's Notes.
This section, which comprised C.C.P. 1881, § 262; R.S., R.C., & C.L., § 4220; C.S., § 6720; I.C.A., § 5-815, was repealed by S.L. 1975, ch. 242, § 1, effective March 31, 1975. For present rule, see Idaho Civil Procedure Rule 5(a) to 5(e).

5-816. Contributory negligence need not be negatived. [Repealed.]

STATUTORY NOTES

Compiler's Notes.
This section, which comprised 1907, p. 323, § 1; reen. R.C. & C.L., § 4221; C.S., § 6721; I.C.A., § 5-816, was repealed by S.L. 1975, ch. 242, § 1. For present rule, see Idaho Civil Procedure Rule 8(c).

5-830. Pre-trial procedure. [Superseded.]

STATUTORY NOTES

Compiler's Notes.
This section numbered 5-830 was added as a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975. It is deemed to have been superseded by Idaho Civil Procedure Rules 16(a) to 16(i).

CHAPTER 9

VARIANCE, MISTAKES, AMENDMENTS

SECTION.
5-901 — 5-907. [Repealed.]

5-901, 5-902. Material and immaterial variance. [Repealed.]

STATUTORY NOTES

Compiler's Notes.
These sections, which comprised C.C.P. 1881, §§ 263, 264; R.S., R.C., & C.L., §§ 4225, 4226; C.S., §§ 6722, 6723; I.C.A., §§ 5-901, 5-902, were repealed by S.L. 1975, ch. 242, § 1, effective March 31, 1975. For present rules, see Idaho Civil Procedure Rules 13(f), 15(b).

5-903. Failure of proof. [Repealed.]

STATUTORY NOTES

Compiler's Notes.
This section, which comprised C.C.P. 1881, § 265; R.S., R.C., & C.L., § 4227; C.S., § 6724; I.C.A., § 5-903, was repealed by S.L. 1975, ch. 242, § 1, effective March 31, 1975. For present rule, see Idaho Civil Procedure Rule 15(b).

5-904. Amendments of course. [Repealed.]

STATUTORY NOTES

Compiler's Notes.
This section, which comprised C.C.P. 1881, § 266; R.S., R.C., & C.L., § 4228; C.S., § 6725; I.C.A., § 5-904, was repealed by S.L. 1975, ch. 242, § 1, effective March 31, 1975. For present rule, see Idaho Civil Procedure Rules 7(c), 12(g), 13(f), 15(a).

5-905. General power to permit amendments — Relief from defaults — Negligence of attorney — Relief and penalty. [Repealed.]

STATUTORY NOTES

Compiler's Notes.
This section, which comprised C.C.P. 1881, § 267; R.S., R.C., & C.L., § 4229; C.S., § 6726; am. 1921, ch. 235, § 1, p. 526; I.C.A., § 5-905, was repealed by S.L. 1975, ch. 242, § 1, effective March 31, 1975. For present rule, see Idaho Civil Procedure Rules 13(f), 15(a), 15(b), 55(c), 60(a), 60(b).

5-906. Fictitious designation of defendant. [Repealed.]

STATUTORY NOTES

Compiler's Notes.
This section, which comprised C.C.P. 1881, § 268; R.S., R.C., & C.L., § 4230; C.S., § 6727; I.C.A., § 5-906, was repealed by S.L. 1975, ch. 242, § 1, effective March 31, 1975. For present rule, see Idaho Civil Procedure Rule 10(a)(4).

5-907. Immaterial errors disregarded. [Repealed.]

STATUTORY NOTES

Compiler's Notes.
This section, which comprised C.C.P. 1881, § 269; R.S., R.C., & C.L., § 4231; C.S., § 6728; I.C.A., § 5-907, was repealed by S.L. 1975, ch. 242, § 1. For present rule, see Idaho Civil Procedure Rules 8(f), 60(a), 61.

CHAPTER 10

UNIFORM CHILD CUSTODY JURISDICTION ACT

SECTION.
5-1001 — 5-1025. [Transferred.]

5-1001 — 5-1025. Uniform child custody jurisdiction. [Transferred.]

STATUTORY NOTES

Compiler's Notes.
Section 4 of S.L. 1982, ch. 311 amended and redesignated these sections as §§ 32-1101 to 32-1126. The amended and redesignated sections were repealed by S.L. 2000, ch. 227, which also enacted the uniform child custody jurisdiction and enforcement act, see § 32-11-101 et seq.

TITLE 6

ACTIONS IN PARTICULAR CASES

CHAPTER 1

FORECLOSURE OF MORTGAGES AND OTHER LIENS

6-101. Proceedings in foreclosure — Construction of section — Meaning of "action" — Effect of foreclosure on holder of unrecorded lien. — (1) There can be but one action for the recovery of any debt, or the enforcement of any right secured by mortgage upon real estate which action must be in accordance with the provisions of this chapter. In such action the court may, by its judgment, direct a sale of the incumbered property (or so much thereof as may be necessary) and the application of the proceeds of the sale to the payment of the costs of the court and the expenses of the sale, and

the amount due to the plaintiff; and sales of real estate under judgments of foreclosure of mortgages and liens are subject to redemption as in the case of sales under execution; [and if it appear from the sheriff's return that the proceeds are insufficient, and a balance still remains due, judgment can then be docketed for such balance against the defendant or defendants personally liable for the debt], and it becomes a lien on the real estate of such judgment debtor, as in other cases on which execution may be issued.

(2) The provisions of this section must be construed in order to permit a secured creditor to realize upon collateral for a debt or other obligation agreed upon by the debtor and creditor.

(3) As used in this section, an "action" does not include any of the following acts or proceedings:

(a) To appoint a receiver for, or obtain possession of, any real or personal property collateral for the debt or other obligation;

(b) To enforce a security interest in, or the assignment of, any rents, issues, profits or other income of any real or personal property;

(c) To enforce a mortgage or other lien upon any real or personal property collateral located outside of the state which is security for the same debt or other obligation;

(d) To secure a judgment outside of this state on a debt or other obligation secured by real property in this state and by real or personal property collateral located outside this state;

(e) For the exercise, pursuant to section 45-1505, Idaho Code, of a power of sale conferred pursuant to section 45-1503, Idaho Code;

(f) For the exercise of any right or remedy authorized by:

(i) The Idaho uniform commercial code, title 28, Idaho Code, except the securing of a judgment on the secured debt, including a deficiency judgment, in a court in Idaho; or

(ii) The uniform commercial code as enacted in any other state;

(g) For claim and delivery of personal property pursuant to chapter 3, title 8, Idaho Code;

(h) For the exercise of any right to set off a deposit account, or to enforce a pledge in a deposit account pursuant to a written agreement or pledge or to enforce a banker's lien;

(i) To draw under a letter of credit;

(j) To collect any debt, or enforce any obligation or right, secured by a mortgage or other lien on real property if the property has been sold to a person other than the creditor to satisfy, in whole or in part, a debt or other obligation or right secured by a senior mortgage or other senior lien on the property;

(k) Relating to any proceeding in bankruptcy, including the filing of a proof of claim, seeking relief from an automatic stay and any other action to determine the amount or validity of a debt or other obligation;

(*l*) For filing a claim pursuant to the Idaho uniform probate code, title 15, Idaho Code, or to enforce such a claim which has been disallowed;

(m) Which does not include the collection of the debt or enforcement of the obligation or realization of the collateral securing the debt or other obligation;

(n) Which is exempted from the provisions of this section by specific statute;

(o) To recover costs of suit, costs and expenses of sale, attorney fees and other incidental relief in connection with any action authorized in this subsection.

(4) No person holding a conveyance from or under the mortgagor of the property mortgaged, or having a lien thereon, which conveyance or lien does not appear of record in the proper office at the commencement of the action, need be made a party to such action; and the judgment therein rendered, and the proceedings therein had, are as conclusive against the party holding such unrecorded conveyance or lien as if he had been made a party to the action.

History.

C.C.P. 1881, § 468; R.S., R.C., & C.L., § 4520; C.S., § 6949; I.C.A., § 9-101; am. 1967, ch. 272, § 1, p. 745; am. 1993, ch. 281, § 1, p. 949.

STATUTORY NOTES

Cross References.

Actions to enforce mortgages against the property of a decedent's estate, § 15-3-803.

Attorney's fees in foreclosure, § 11-402.

Carey Act lands, foreclosure of water contracts on, §§ 42-2025 — 42-2035.

Deficiency judgments, restriction on amount, § 6-108.

Injury to real property during foreclosure of mortgage, injunction against, § 6-407.

Joinder of actions for foreclosure with actions to quiet title, §§ 45-1302, 45-1303.

Judgments affecting land to be recorded with deed records, § 31-2407.

Lien of judgments, recording, § 10-1110.

Limitation of mortgagor's action to redeem a mortgage, § 5-226; partial redemption, § 5-227.

Lis pendens, § 5-505.

Mortgages in general, § 45-901 et seq.

Partition of real estate, application of proceeds of sale when property encumbered, § 6-520; resort to other securities compelled, § 6-521; referee may take receipt for lienholder's interest, § 6-535.

Party in possession of property, injunction against injury while foreclosure sale pending, § 6-407; damages for injury pending sale after execution, § 6-408.

Real estate mortgages, § 45-901 et seq.

Receivership in foreclosure proceedings, § 8-601.

Redemption in cases of sales under execution, § 11-401 et seq.

Sales under execution, § 11-304.

Unknown owners or heirs as parties, § 5-326.

Venue of foreclosure actions, § 5-401.

Compiler's Notes.

The words "and if it appear from the sheriff's return that the proceeds are insufficient, and a balance still remains due, judgment can then be docketed for such balance against the defendant or defendants personally liable for the debt" in subsection (1), were placed in brackets by the compiler to indicate that this portion of the section probably has been repealed by § 6-108 herein.

Other words in parentheses so appeared in the law as enacted.

The amendment by S.L. 1967, ch. 272, which removed personal property from the provisions of this section, became effective at midnight, December 31, 1967, and rights acquired prior to such date may be enforced as if such amendment was not made.

JUDICIAL DECISIONS

Analysis

Actions permitted or prohibited.
—Claim and delivery.
—Conversion.
—Decedent's estate, claims against.
—Ejectment.
Attorney's fees.
Collection of debt against mortgagor's successor.

Actions Permitted or Prohibited.

Mortgage may be reformed and foreclosed in the same action. Christensen v. Hollingsworth, 6 Idaho 87, 53 P. 211 (1898).

Corporation may confess judgment for sum due under judgment of foreclosure in consideration of the release of the foreclosure judgment. Dahlstrom v. Walker, 33 Idaho 374, 194 P. 847 (1920).

Where taxes were paid before relation of mortgagor and mortgagee existed and were not included in mortgage, they do not come within this section. Eaton v. McCarty, 34 Idaho 747, 202 P. 603 (1921).

Where mortgagor covenants to keep the property fully insured for the benefit of mortgagee, mortgagee's action to establish equitable lien on proceeds of such insurance is not in conflict with this section. First Nat'l Bank v. Commercial Union Assurance Co., 40 Idaho 236, 232 P. 899 (1925).

This section does not apply to action whose purpose is to recover security in danger of dissipation and place mortgagee as nearly as possible in status quo. First Nat'l Bank v. Commercial Union Assurance Co., 40 Idaho 236, 232 P. 899 (1925).

—Claim and Delivery.

Where chattel mortgagee elects to enforce his rights by foreclosure, that action becomes exclusive and he cannot subsequently bring action of claim and delivery for possession of property. Cederholm v. Loofborrow, 2 Idaho 191, 9 P. 641 (1886).

This section does not preclude a party from maintaining an action of claim and delivery for the recovery of property mortgaged, where same has been wrongfully taken by third party. O'Neill v. Whitcomb, 3 Idaho 624, 32 P. 1133 (1893).

Chattel mortgagee, foreclosing on cattle voluntarily surrendered, could not thereafter maintain a separate action in claim and delivery to recover cattle held by third party under agister's lien. Portland Cattle Loan Co. v. Biehl, 42 Idaho 39, 245 P. 88 (1925).

A deficiency judgment on mortgage foreclosure determines that mortgage security has been exhausted and mortgagee cannot go behind such judgment in claim and delivery action and maintain that he is entitled to possession of property not disposed of by foreclosure sale. Portland Cattle Loan Co. v. Biehl, 42 Idaho 39, 245 P. 88 (1925).

Claim and delivery is not "one action" to foreclose mortgage and it may be maintained against stranger for possession of mortgaged chattel, where mortgage entitles mortgagee to possession. Forbush v. San Diego Fruit & Produce Co., 46 Idaho 231, 266 P. 659 (1928).

Where a claim and delivery action for possession of property sold under a conditional sale contract was held, on appeal, not maintainable because title to the property vested in the vendee by the vendee's subsequent mortgage to the vendor, cause was remanded to allow plaintiff to amend his complaint and convert action into one of foreclosure. Birkeland v. Clearwater Concentrating Co., 64 Idaho 122, 127 P.2d 1047 (1942).

A claim and delivery action for possession of machinery sold on a conditional sales contract was not maintainable, where such machinery was subsequently mortgaged by the vendee to the vendor, since the taking of the mortgage vested title in the vendee, and the only method of enforcing any right secured by the mortgage was by a foreclosure proceeding. Birkeland v. Clearwater Concentrating Co., 64 Idaho 122, 127 P.2d 1047 (1942).

—Conversion.

Where action was primarily one to foreclose chattel mortgage, it is proper to join in action claim for conversion against parties who have converted certain chattels covered by mortgage. Berg v. Carey, 40 Idaho 278, 232 P. 904 (1925).

Mortgagee may bring action for conversion of mortgaged chattel when it has passed into hands of third party, such action having no connection with the mortgage security as such or with the mortgage debt. Forbush v. San Diego Fruit & Produce Co., 46 Idaho 231, 266 P. 659 (1928).

—Decedent's Estate, Claims Against.

With reference to its application to enforcement of claim against decedent's estate, filing of claim with administrator is not action within meaning of section, and gives to claimant no right of action, but leaves selling of property and payment of debts to discretion of administrator in manner prescribed by law. Kendrick State Bank v. Barnum, 31 Idaho 562, 173 P. 1144 (1918); Berry v. Scott, 43 Idaho 789, 255 P. 305 (1927).

A petition by the holder of a mortgage upon real estate to require the administrator of the deceased mortgagor's estate to sell the mortgaged property "to secure the just rights or interests of the creditors" is not a proceeding to foreclose the mortgage. McKenney v. McNearney, 92 Idaho 1, 435 P.2d 358 (1967).

—Ejectment.

Where contract and deed clearly show that deed was given to secure a debt, creditor cannot maintain ejectment but must foreclose his lien as a mortgage. Dickens v. Heston, 53 Idaho 91, 21 P.2d 905 (1933). To same effect, see Kelley v. Leachman, 3 Idaho 392, 29 P. 849 (1892).

A mortgagor, sued in ejectment but claiming his deed absolute in form to mortgagee was in fact a mortgage, need not tender the amount of the debt in making such claim where the debt was not yet due. Dickens v. Heston, 53 Idaho 91, 21 P.2d 905 (1933).

Attorney's Fees.

Action to foreclose mortgage given to secure several notes is a separate and distinct action, and but one fee can be allowed in such action; if such fee is stipulated by mortgage to be reasonable, the court has no authority to allow a larger sum. Lewis v. Sutton, 21 Idaho 541, 122 P. 911 (1912).

To entitle plaintiff in foreclosure proceeding to recover attorney's fees, where same have been stipulated for in mortgage, plaintiff must tender evidence upon two propositions: First, that plaintiff has agreed to pay his counsel a fixed or reasonable sum for his services; second, reasonableness of the fee. Lewis v. Sutton, 21 Idaho 541, 122 P. 911 (1912).

Collection of Debt Against Mortgagor's Successor.

A mortgagee was not precluded from suing to collect the entire debt secured by a mortgage where the debt was not due and where there was no basis to foreclose the mortgage at the time the property was sold to a third party by the trustee of prior deeds of trust for less than the fair market value of the property. Idaho Power Co. v. Benj. Houseman Co., 123 Idaho 674, 851 P.2d 970 (1993).

Conditional Sales Contract.

This section does not preclude recovery on personal judgment under other provisions of law. Petersen v. Philco Fin. Corp., 91 Idaho 644, 428 P.2d 961 (1967).

Construction and Purpose of Section.

From this section it is evident that legislature intended to do away with multiplicity of suits, as it has fully provided for protection of all rights in one suit. Portland Cattle Loan Co. v. Biehl, 42 Idaho 39, 245 P. 88 (1925); Harshbarger v. Rankin, 50 Idaho 24, 293 P. 327 (1930).

Intention of legislature in enacting this section was to provide exclusive remedy in such cases. Berry v. Scott, 43 Idaho 789, 255 P. 305 (1927).

The liability to pay the mortgage debt rests upon the mortgaged property as well as the mortgagor. Steward v. Nelson, 54 Idaho 437, 32 P.2d 843 (1934).

This section prohibits the sale of mortgaged land, or land deeded to secure a debt, without

foreclosure to satisfy the debt secured. Jaussaud v. Samuels, 58 Idaho 191, 71 P.2d 426 (1937).

This section is mandatory and its provisions are to be strictly followed. Brockman v. Caviness, 61 Idaho 254, 100 P.2d 946 (1940).

Construction of Foreclosure Decree.

A foreclosure decree is in rem until after sale. Great Am. Indem. Co. v. Bisbee, 59 Idaho 18, 79 P.2d 1037 (1938).

A mortgage foreclosure decree, providing that the purchaser of mortgaged premises at the foreclosure sale should be let into possession thereof, and should have possession on production of sheriff's deed, conformed to the statute relating to redemption of realty from mortgage foreclosure sale, and cannot be construed to mean that mortgagee or any other purchaser at such sale was to have possession of the mortgaged property prior to one year from the date of sale or before the issuance of the sheriff's deed. Eastern Idaho Loan & Trust Co. v. Blomberg, 62 Idaho 497, 113 P.2d 406 (1941).

Death of Mortgagor.

In the event of the death of the mortgagor, if the mortgagee believes that the security is sufficient to pay his mortgage, he may waive all recourse to a deficiency judgment and look alone to the security to pay the mortgage; or, if he does not believe the security to be sufficient to pay the amount of the mortgage, he may present his claim to the executor or administrator and, if it be rejected, he may then bring an action to foreclose without waiving recourse against the other property of the estate. Berry v. Scott, 43 Idaho 789, 255 P. 305 (1927).

Deed Construed as Mortgage.

Where a deed and a separate agreement for a reconveyance on specified conditions are such as to constitute together in legal effect a mortgage, mortgagee's remedy in case of default of mortgagor is by foreclosure and sale; he cannot maintain ejectment. Kelley v. Leachman, 3 Idaho 392, 29 P. 849 (1892).

A deed absolute on its face and a contemporaneous contract for reconveyance upon payment of the amount due grantee constitutes a mortgage and must be foreclosed. Brown v. Bryan, 5 Idaho 145, 51 P. 995 (1896).

A trust deed executed to secure a given debt, payable at a specific time, is a mortgage and cannot be foreclosed by notice and sale under a power contained in the deed, but only by proceedings under this section. Brown v. Bryan, 5 Idaho 145, 51 P. 995 (1896).

In determining whether a deed, absolute in form, was intended as a mortgage, it is proper to consider previous negotiations of the parties, their agreements, conversations and course of dealings and the value of the property may likewise be considered, together with the necessitous condition of mortgagor in connection with the inadequacy of the consideration. Dickens v. Heston, 53 Idaho 91, 21 P.2d 905 (1933).

Where a deed is absolute in form, but in fact is given as a mortgage, the mortgagee is not deprived of his right of indebtedness nor of his mortgage lien, but he may not protect his rights by an action in ejectment. Dickens v. Heston, 53 Idaho 91, 21 P.2d 905 (1933).

In suit to have deed and contract for reconveyance decreed to constitute a mortgage, complaint alleging that the grantees paid the balance of the purchase price to the vendors of the grantors and that the deed was executed for the purpose of securing repayment of the money and that the grantees were not in default was sufficient on demurrer. Fond v. McCreery, 55 Idaho 144, 39 P.2d 766 (1934).

An agreement by one of the mortgagors, the owners of the first mortgage, and by the second mortgagee which had purchased the property on foreclosure of the second mortgage, under which the second mortgagee deeded the realty to the owners of the first mortgage, the consideration for the deed being paid by the mortgagors, constituted a "mortgage" requiring a foreclosure to satisfy the debt secured, where it was not the intention of the parties to cancel the first mortgage or the debt. Jaussaud v. Samuels, 58 Idaho 191, 71 P.2d 426 (1937).

An instrument absolutely conveying realty stands as the clearly ascertained intention of the parties, which must be enforced unless it is shown by convincing evidence that the instrument, as delivered and accepted, was under a different mutual intention;, and, where one seeks to prove that an instrument which purports on its face to be an absolute conveyance of title is in fact a mortgage, he must do so by clear, satisfactory and convincing proof. Hill v. Daugherty, 63 Idaho 12, 115 P.2d 759 (1941).

A grantor seeking to show that an absolute conveyance is not what it naturally purports to be has the burden of making strict proof of that fact, and slight and indefinite evidence should not be permitted to change the character of the transaction given the form of a bargain and sale. Hill v. Daugherty, 63 Idaho 12, 115 P.2d 759 (1941).

Where the court found defendant's deeds under which plaintiff claimed title to be mortgages and granted defendant sixty (60) days in which to pay the amount found to be due on such mortgages, it was error to decree that, upon failure of defendant to make such payment, the mortgages should be deemed foreclosed and title quieted in plaintiff. Gem-Valley Ranches, Inc. v. Small, 90 Idaho 354, 411 P.2d 943 (1966).

Deed Not a Mortgage.

Where deed, and the expressed intent of the parties, clearly and unambiguously showed that the deed was not a mortgage, deed should not have been treated as a security instrument under this section and § 6-104. Kerr Land & Livestock, Inc. v. Glaus, 107 Idaho 767, 692 P.2d 1199 (1984).

Defendant's Rights.

Where the fair market value of a farm upon which defendants discontinued making mortgage payments exceeded both the first and second mortgages and the defendants had a legal right to insist the plaintiffs first look to their security for payment on the note, and where the defendants had the right to claim the protection of § 6-108 which prohibits a deficiency judgment if the value of the security is equal to or exceeds the mortgage indebtedness, by insisting on a nonrecourse note and a release of individual liability, the defendants obtained no greater rights than they had by statute under the circumstances then existing, and their insistence on retaining these rights could not form the basis of a claim of economic duress. Isaak v. Idaho First Nat'l Bank, 119 Idaho 988, 812 P.2d 295 (Ct. App. 1990).

Deficiency Judgment.

In connection with the cases set out under the heading, see § 6-108.

Provision of this section for docketing deficiency judgment against person liable for debt has no application to foreclosure of a chattel mortgage by notice and sale. Advance Thresher Co. v. Whiteside, 3 Idaho 64, 26 P. 660 (1891); South Side Live Stock Loan Co. v. Iverson, 45 Idaho 499, 263 P. 481 (1928).

If, in a suit to foreclose a mortgage, the court should decide that plaintiff is not entitled to foreclosure, yet, nevertheless, the plaintiff should have judgment for any portion of the mortgage debt shown by the pleadings and proof to be due him, against the defendants personally liable therefor. Jaeckel v. Pease, 6 Idaho 131, 53 P. 399 (1898).

Where seller of interest in certain mining claims retains title to buyer's interest to secure payment of the price, vendor is entitled to foreclose lien so retained on purchaser's default and to recover deficiency judgment against purchaser on failure of his interest to sell for enough to satisfy debt. Ferguson v. Blood, 152 F. 98 (9th Cir. 1907).

Deficiency judgment is allowable on foreclosure of vendor's lien. Farnsworth v. Pepper, 27 Idaho 154, 148 P. 48 (1915).

Decree of foreclosure of a mortgage is in no sense a personal judgment, and no personal judgment can be entered until after the foreclosure sale. Perkins v. Bundy, 42 Idaho 560, 247 P. 751 (1926); Great Am. Indem. Co. v. Bisbee, 59 Idaho 18, 79 P.2d 1037 (1938); Donaldson v. Henry, 61 Idaho 634, 105 P.2d 731 (1940).

There is no means of recovering a deficiency except by action against mortgagor. South Side Live Stock Loan Co. v. Iverson, 45 Idaho 499, 263 P. 481 (1928).

Mortgagee, having seized mortgaged chattels without mortgagor's consent, could not subsequently recover deficiency in suit on mortgage note. Garrett v. Soucie, 46 Idaho 289, 267 P. 1078 (1928).

The debtor is liable to only one action for the recovery of the debt, and this is applicable to a debt secured by mortgage on realty or personalty. Jeppesen v. Rexburg State Bank, 57 Idaho 94, 62 P.2d 1369 (1936).

This section requires that there can be but one action for the recovery of any debt or enforcement of any right secured by mortgage and requires the creditor to proceed for the collection of his debt against the property and to exhaust the security thereof before being allowed to acquire personal judgment against the debtor; and it was intended not to allow the creditor to hold an encumbrance on his debtor's property and at the same time proceed against him for a personal judgment, either with or without attachment. Jeppesen v. Rexburg State Bank, 57 Idaho 94, 62 P.2d 1369 (1936).

The rule that a debtor is subject to but one action for the recovery of a debt secured by mortgage does not apply to and protect an endorser of the note from an independent action against him on his contract of endorsement, where his promise to pay on default of the maker is not likewise secured by a mortgage. Jeppesen v. Rexburg State Bank, 57 Idaho 94, 62 P.2d 1369 (1936).

A decree of foreclosure, originally or after return of sale, must determine who is personally liable for the debt, and without such adjudication, there is no legal basis for a deficiency judgment; a recital in a decree of foreclosure that there is a certain sum owing and unpaid to plaintiff from defendants and ordering a foreclosure of the mortgage is insufficient to justify a deficiency judgment. Donaldson v. Henry, 61 Idaho 634, 105 P.2d 731 (1940).

A foreclosure decree which recited that if the mortgaged premises failed to bring a sufficient amount on a sheriff's sale to discharge the mortgage debt with costs and expenses of sale, a deficiency judgment should be docketed in conformity with the law and practice of the court was an insufficient determination of a personal liability to warrant an entry of a deficiency judgment. Donaldson v. Henry, 61 Idaho 634, 105 P.2d 731 (1940).

A deficiency judgment entered in a real estate mortgage foreclosure suit was void where the decree of foreclosure, although providing that if the mortgaged premises failed

to bring a sufficient amount on sheriff's sale to discharge the mortgage debt with costs and expenses of sale a deficiency judgment should be docketed, failed to designate any defendant as being personally liable; and the judgment was not aided by the doctrine that all has been determined that should have been. Donaldson v. Henry, 61 Idaho 634, 105 P.2d 731 (1940).

Ex parte orders, which stayed execution on deficiency judgment entered in a real estate mortgage foreclosure suit and, thereafter, vacated order staying execution, were a nullity. Donaldson v. Henry, 61 Idaho 634, 105 P.2d 731 (1940).

The prosecution of an action for recovery of a debt secured by a mortgage in any other manner or form than by foreclosure action is prohibited by this section. Birkeland v. Clearwater Concentrating Co., 64 Idaho 122, 127 P.2d 1047 (1942).

In an action to recover a deficiency judgment, where the realty mortgaged as security is located in another state, this section has no application. American Mut. Bldg. & Loan Co. v. Kesler, 64 Idaho 799, 137 P.2d 960 (1943).

The adoption of S.L. 1937, ch. 190, repealing S.L. 1937, ch. 31, which prohibited any court from entering a deficiency judgment, left § 6-108 in full force and effect, and the court had the right to enter a deficiency judgment against defendant in a mortgage foreclosure action. Brown v. Deck, 65 Idaho 710, 152 P.2d 587 (1944).

Where beneficiaries of deed of trust opted for judicial foreclosure, rather than foreclosure by advertisement and sale, the court properly determined the amount of the deficiency judgment by proceeding under § 6-108. Thompson v. Kirsch, 106 Idaho 177, 677 P.2d 490 (Ct. App. 1984).

If the mortgage given as security is defective or has become valueless, the mortgagee, assuming it prevails on the merits, is still entitled to a judgment on the promissory note which is independent of the mortgage security. Gebrueder Heidemann, K.G. v. A.M.R. Corp., 107 Idaho 275, 688 P.2d 1180 (1984).

—Exhaustion of Security.

There can be no money judgment in action to foreclose mortgage, either real or chattel, until exhaustion of the mortgage security, after which a money judgment may be entered for any deficiency. Barnes v. Buffalo Pitts Co., 6 Idaho 519, 57 P. 267 (1899); Jeppesen v. Rexburg State Bank, 57 Idaho 94, 62 P.2d 1369 (1936).

Holder of a note secured by mortgage may not maintain action at law, without foreclosing, unless security has become worthless. Clark v. Paddock, 24 Idaho 142, 132 P. 795 (1913); Dighton v. First Exch. Nat'l Bank, 33 Idaho 273, 192 P. 832 (1920); International Mtg. Bank v. Barghoorn, 43 Idaho 24, 248 P. 868 (1926); Berry v. Scott, 43 Idaho 789, 255 P. 305 (1927); Warner v. Bockstahler, 48 Idaho 419, 282 P. 862 (1929).

A bank, which was the payee of a note on which a depositor was an endorser, is entitled to charge the amount due on the note at maturity against the deposit of such endorser without exhausting the security of a mortgage given by the maker of the note subsequent to the execution thereof and the endorsement of same, since the secondary obligation of the endorser was not secured by mortgage. Jeppesen v. Rexburg State Bank, 57 Idaho 94, 62 P.2d 1369 (1936).

This section does not preclude a mortgagee from suing in an independent action on the note for which security was given, where the security has become valueless. Edminster v. Van Eaton, 57 Idaho 115, 63 P.2d 154 (1936).

With regard to a mortgage foreclosure action, a mortgagee must first seek payment of a mortgage debt from the mortgaged property; only if there is a deficiency will the mortgagee be allowed to pursue the other assets of the mortgage debtor. Federal Land Bank v. Parsons, 118 Idaho 324, 796 P.2d 533 (Ct. App. 1990).

—Independent Action.

Where it appears from the return of officer, made in pursuance to this section that there remains a deficiency after applying proceeds of sale upon mortgage debt, mortgagee may maintain action to recover deficiency. Advance Thresher Co. v. Whiteside, 3 Idaho 64, 26 P. 660 (1891).

Notwithstanding this section, where a mortgagee's security has become valueless, he has a complete and independent action on the note secured by the mortgage, and he may in such action assert his right upon the note independent of the mortgage security. Edminster v. Van Eaton, 57 Idaho 115, 63 P.2d 154 (1936).

—Nature and Sufficiency.

It is essential to validity of decree foreclosing mortgage that it ascertain amount due plaintiff to be realized from sale of the mortgaged property; the decree must be so specific that clerk can issue order of sale thereon without reference to other entries or papers. Vermont Loan & Trust Co. v. McGregor, 5 Idaho 510, 51 P. 104 (1897).

On distribution by federal court of equity in Idaho of assets of an insolvent corporation, trustee of a mortgage in the state is entitled to share as creditor in the unmortgaged assets in hands of receiver on basis of amount of his deficiency judgment only. Westinghouse Elec. & Mfg. Co. v. Idaho Ry., Light & Power Co., 228 F. 972 (D. Idaho 1915).

—Persons Liable.

Water users association members are liable for deficiency judgment on foreclosure sale of

association's assets. Michaelson v. Miller, 53 Idaho 617, 26 P.2d 378 (1933).

On a mortgage foreclosure, where decree was defective as first entered in not naming the defendant personally liable for the payment of the mortgage debt, such decree may be amended at any time by adding a clause designating the defendant who is personally liable, where the record clearly shows who he is. Donaldson v. Henry, 63 Idaho 467, 121 P.2d 445 (1941).

The record showing an execution of a mortgage, entry of the foreclosure decree, and that the mortgagor transferred the mortgaged property, and that by a decree of foreclosure the court adjudged that the transferee "assumed and promised to pay" the mortgage debt clearly disclosed that the transferee was personally liable for the payment of the mortgage debt, so as to authorize an amendment of the foreclosure decree by adding a clause designating the transferee as person personally liable. Donaldson v. Henry, 63 Idaho 467, 121 P.2d 445 (1941).

Existing Law as Part of Mortgage.

Law existing when a mortgage is made enters into and becomes a part of the contract. Steward v. Nelson, 54 Idaho 437, 32 P.2d 843 (1934).

Determining Value.

The correct date for determining the value of real property was the date when the trial court in a foreclosure case determined whether a deficiency judgment should be entered pursuant to § 6-108. Isaak v. Idaho First Nat'l Bank, 119 Idaho 907, 811 P.2d 832 (1991).

—Pleading and Practice.

In an action on a note secured by a chattel mortgage, the mortgagee is not required to allege that the note was secured by a mortgage originally and then avoid this effect by averment that it had become valueless where this did not appear from the face of the complaint; and in such action the court erred in refusing plaintiff's proof that the security had become valueless, since plaintiff was not required to reply to the affirmative defense set up in an answer. Edminster v. Van Eaton, 57 Idaho 115, 63 P.2d 154 (1936).

Where the complaint in a suit to foreclose a real estate mortgage merely prayed that the plaintiff have judgment and execution against defendants for any deficiency which might remain, and plaintiff's motion to set aside a stay of execution theretofore entered did not ask that a personal liability judgment be entered against anyone, plaintiff's pleadings did not render valid a deficiency judgment which was entered after the decree of foreclosure which failed to designate any defendant as being personally liable. Donaldson v. Henry, 61 Idaho 634, 105 P.2d 731 (1940).

Jurisdiction of Court.

Where court has acquired jurisdiction of mortgagor, it thereby acquired jurisdiction of all parties holding unrecorded conveyances or contracts from the mortgagor, so as to conclude them in foreclosure proceedings. Harding v. Harker, 17 Idaho 341, 105 P. 788 (1909).

In suit to establish trust and foreclosure mortgage in certain county, court has jurisdiction to proceed against mortgage security in that county. Zohos v. Marefolos, 48 Idaho 291, 281 P. 1114 (1929).

Limitations on Application of Section.

This section relates exclusively to mortgages on property in Idaho. Canadian Birkbeck Inv. & Sav. Co. v. Williamson, 32 Idaho 624, 186 P. 916 (1920).

This section is not a limitation upon the power to enter into a contract by which mortgagee may agree to waive or release security of his mortgage. Dahlstrom v. Walker, 33 Idaho 374, 194 P. 847 (1920).

Declared purpose of this section is to protect original debtor against multiplicity of suits and does not extend to actions upon obligations of third persons held by mortgagee as collateral. First Nat'l Bank v. Commercial Union Assurance Co., 40 Idaho 236, 232 P. 899 (1925).

This section applies only to mortgage securities, and one who holds security by way of lien or pledge may sue direct without foreclosure. Mason v. Jansen, 45 Idaho 354, 263 P. 484 (1927).

Proceedings under this section do not apply in cases of foreclosure of chattel mortgage by notice and sale. South Side Live Stock Loan Co. v. Iverson, 45 Idaho 499, 263 P. 481 (1928).

This section has no applicability whatsoever unless action brought against mortgagor directly affects his rights under mortgage contract. Forbush v. San Diego Fruit & Produce Co., 46 Idaho 231, 266 P. 659 (1928).

Mortgage Given Subsequent to Judgment.

This section does not protect an endorser of a note not secured by mortgage at the time he endorsed it by the fact that the maker subsequently gave security. Jeppesen v. Rexburg State Bank, 57 Idaho 94, 62 P.2d 1369 (1936).

One or Several Transactions.

It is error to decree a joint sale of distinct parcels of property mortgaged to secure several different debts, by different mortgages, for the satisfaction of the aggregate amount of all the mortgage debts. Strode v. Miller, 7 Idaho 16, 59 P. 893 (1900).

Action to foreclose a mortgage given to secure several notes is a separate and distinct

action. Lewis v. Sutton, 21 Idaho 541, 122 P. 911 (1912).

Where three separate notes secured by three separate mortgages were executed between the same parties, they constituted separate transactions although executed at the same time and could be foreclosed in separate suits. Merchants Trust Co. v. Davis, 49 Idaho 494, 290 P. 383 (1930).

Parties.

One who has purchased mortgaged land and has been in possession of the same and paid taxes thereon for a number of years need not be made a party to foreclosure proceedings where he fails to place his deed on record prior to the commencement of such proceedings. Mills v. Smiley, 9 Idaho 317, 76 P. 783 (1903).

Mortgagor is presumed to represent interests of grantee of unrecorded conveyance in suit to foreclose; and same presumption would arise, where grantee is made a party, that he would represent the interests of a person holding an unrecorded conveyance from such grantee. Harding v. Harker, 17 Idaho 341, 105 P. 788 (1909).

In action to foreclose chattel mortgage, it is always proper and in most instances necessary, to make as parties all who have or claim to have an interest in the property. Bank of Roberts v. Olaveson, 38 Idaho 223, 221 P. 560 (1923).

Failure to make holder of unrecorded assignment of lease party to foreclosure of liens against crop did not render judgment invalid as to it. Farm Credit Corp. v. Rigby Nat'l Bank, 49 Idaho 444, 290 P. 211 (1930).

Persons Bound by Proceedings.

Purpose of this section is to regulate enforcement of obligations secured by mortgage, and this section is binding not only on parties to contract but also on subsequent transferees of mortgaged premises with notice. Dighton v. First Exch. Nat'l Bank, 33 Idaho 273, 192 P. 832 (1920).

Person having no other interest in premises than as burying ground is bound by decree of foreclosure. Noble v. Harris, 33 Idaho 401, 195 P. 543 (1921).

Lien of foreclosure judgment held superior to that of holder of unrecorded assignment of unrecorded lease, although he was not made a party to the foreclosure proceedings. Farm Credit Corp. v. Rigby Nat'l Bank, 49 Idaho 444, 290 P. 211 (1930).

Presumption That Conveyance Did Not Extinguish Debt.

The rule that, when a mortgagor has conveyed the mortgaged premises to the mortgagee, the conveyance only operates as a bar to the equity of redemption when it unequivocally appears that both parties so intended, applied where by agreement between one of the mortgagors and the owners of a first mortgage, the land was deeded by the second mortgagee which had acquired the property on a sale under the second mortgage, on the payment of the purchase price by the mortgagors to the owners of the first mortgage, who gave the mortgagor an option to purchase by payment of the mortgage indebtedness. Jaussaud v. Samuels, 58 Idaho 191, 71 P.2d 426 (1937).

Recordation Requirements.

Since a lien against the property in question existed by virtue of the recording of a mortgage, recording a "Judgment and Decree of Foreclosure and Order of Sale" with the county recorder was not required in order to proceed with a sheriff's sale, or issuance of a sheriff's certificate of sale and ultimately a sheriff's deed on foreclosure. Federal Land Bank v. Parsons, 118 Idaho 324, 796 P.2d 533 (Ct. App. 1990).

Remedy Exclusive.

Holder of note, secured by a valid mortgage, has no right to sue on note alone and summon the surety on the note alone, and proceed for a money judgment against him alone, since his proper remedy is to exhaust his rights against the principal on the mortgage first. First Nat'l Bank v. Williams, 2 Idaho 670, 23 P. 552 (1890).

Power of sale given to mortgagee by the mortgage is void and does not authorize the summary foreclosure of the mortgage by mortgagee under such power. Rein v. Callaway, 7 Idaho 634, 65 P. 63 (1901).

Whatever the form of agreement, if it in fact constitutes a mortgage, it can only be enforced by foreclosure. Payette-Boise Water Users' Ass'n v. Fairchild, 35 Idaho 97, 205 P. 258 (1922).

The "one action" contemplated by this section is action, object of which is to secure personal judgment on original contract of indebtedness against mortgagor and his privy. First Nat'l Bank v. Commercial Union Assurance Co., 40 Idaho 236, 232 P. 899 (1925).

Where a mortgage covenant expressly provided that the mortgagors should "keep the property fully insured for the benefit of the mortgagee, as its interest shall appear," and the mortgagors had at such time already procured certain insurance thereon in the name of one of them in a less sum than the mortgagee's interest, the mortgagee, after loss of the property, had an equitable lien upon the proceeds of such policy as against the mortgagors and their assignee for the benefit of creditors made after the fire and where the mortgagee joined the insurance company, the mortgagors and the assignee in an action to establish such equitable lien,

such action was not in conflict with this section and did not violate the single action theory enacted in this section. First Nat'l Bank v. Commercial Union Assurance Co., 40 Idaho 236, 232 P. 899 (1925).

Action could not be maintained against mortgagor's co-maker on note, where mortgage was released by plaintiff without foreclosure and security had not become valueless subsequent to giving of mortgage. York v. Roberts, 47 Idaho 312, 274 P. 799 (1929).

An action to foreclose on a mortgage is normally the only action permitted for recovery of any debt secured by a mortgage upon real property. Eastern Idaho Prod. Credit Ass'n v. Placerton, Inc., 100 Idaho 863, 606 P.2d 967 (1980).

This section authorizes a single form of action to collect a debt secured by a mortgage; the mortgage must be foreclosed. A deficiency judgment may be obtained if the foreclosure sale does not satisfy the debt; but the deficiency is limited to the difference between the fair market value of the real property and the amount of the unpaid debt. The creditor may not simply sue on the debt and collect by execution on the judgment. Quintana v. Anthony, 109 Idaho 977, 712 P.2d 678 (Ct. App. 1985).

To collect on a debt secured by a mortgage, the mortgage must be foreclosed; the creditor may not simply sue on the debt and collect by execution on the judgment. Federal Land Bank v. Parsons, 116 Idaho 545, 777 P.2d 1218 (Ct. App. 1989).

Remedy Not Exclusive.

Holders of a promissory note secured by a deed of trust encumbering real property may sue for a money judgment on the note without first exhausting their security by judicial foreclosure or by exercise of the power of sale; Idaho's single-action statute does not apply to deeds of trust. Frazier v. Neilsen & Co., 115 Idaho 739, 769 P.2d 1111 (1989).

Order of foreclosure did not terminate individual owners' interests which were not of record when the foreclosure was commenced by the successor in interest to the original developer of a condominium project; the interest asserted by the owners was an equitable interest that had not yet been adjudicated, so there was no mechanism for recording the asserted equitable interest, and this section did not terminate those equitable interests. West Wood Invs. v. Acord, 141 Idaho 75, 106 P.3d 401 (2005).

Right of Redemption.

There is right of redemption from foreclosure sale under this section; from execution sale under § 11-401, and from other sales under foreclosure of various liens; but the statute nowhere in express terms grants right of redemption from receiver's sale; and, where sale made is not sale on foreclosure but is sale by court's receiver, under direct authority and supervision of court, the direction may be that sale be made without right of redemption and that a deed absolute be given; if such decree is made and no appeal is prosecuted from this feature of it, the decree becomes final. Hewitt v. Walters, 21 Idaho 1, 119 P. 705 (1911).

Where the amount of a senior mortgagee's lien is less than the judicially determined fair market value of the property, the junior lienholder should be required either to redeem to protect its security or to give credit to the debtor against any deficiency judgment for the difference between the amount realized by the senior mortgagee on the foreclosure sale and the judicially determined fair market value of the property as of the date the junior's redemption right expired. First Sec. Bank v. Stauffer, 112 Idaho 133, 730 P.2d 1053 (Ct. App. 1986).

Sale Under Foreclosure.

It is duty of officer to sell land to highest bidder or, in doubtful cases, to adjourn sale. Federal Land Bank v. Curts, 45 Idaho 414, 262 P. 877 (1927).

As a general rule, mere inadequacy of consideration is not sufficient to set aside sale under foreclosure, but gross inadequacy coupled with slight additional circumstances is sufficient. Federal Land Bank v. Curts, 45 Idaho 414, 262 P. 877 (1927).

It is within power of court to direct how and in what order land shall be sold, or whether it shall be sold in one piece or parcel. Federal Land Bank v. Curts, 45 Idaho 414, 262 P. 877 (1927).

Where decree is silent as to manner or order in which land shall be sold, provisions relating to conduct of sales in execution of judgments apply. Federal Land Bank v. Curts, 45 Idaho 414, 262 P. 877 (1927).

Decree directing that property be sold in manner prescribed by law and practice of court is not direction to sell in any special or particular order, either as whole or in parcels, but is general instruction to sell only in accordance with laws applicable to sales under foreclosure and practice of court, if any, not inconsistent with such statutes. Federal Land Bank v. Curts, 45 Idaho 414, 262 P. 877 (1927).

While practice of acceptance of written bid contained in letter has much to condemn it and should not be encouraged, weight of authority is in favor of validity of such bid, especially where there is no discretion vested in sheriff and amount of bid is definitely fixed. Federal Land Bank v. Curts, 45 Idaho 414, 262 P. 877 (1927).

Simultaneous Foreclosure.

Where acceptable to the mortgagees, there is no impediment to ordering a simultaneous

foreclosure; the foreclosure sale would result in each party being reimbursed by priority to the extent of the proceeds, neither would receive a redemption right, and each would receive a deficiency to the extent his or her debt was not satisfied, with appropriate credit being given for the reasonable value of the security. First Sec. Bank v. Stauffer, 112 Idaho 133, 730 P.2d 1053 (Ct. App. 1986).

Single Action Rule.

Seller did not violate the Idaho "single action" rule of this section for judicial foreclosure of a seller's interest in a land sales contract is an accepted form in Idaho and the state court judgment granted a money judgment and ordered foreclosure on the property through the form of an execution sale. In re Krueger, 127 Bankr. 252 (Bankr. D. Idaho 1991).

Property owner's stipulations with the shareholders did not render the owners' security interest in the farm's property valueless, because the owners were simply undertaking to collect part of the indebtedness from the shareholders prior to collecting from the farm as the contractual obligations permitted; under the one-action rule, the farm property remained subject to the mortgage securing the promissory notes for the business and land contracts with the owners. Elliott v. Darwin Neibaur Farms, 138 Idaho 774, 69 P.3d 1035, cert. denied, 540 U.S. 1004, 124 S. Ct. 535, 157 L. Ed. 2d 410 (2003).

Splitting of Actions.

In foreclosure action where defendants filed cross-complaint alleging failure of plaintiffs to carry out certain agreement and a conspiracy by plaintiffs to ruin defendant's credit and business so that defendants would have to default, the rule against splitting of actions was not violated by the cross-complaint, all parties interested in the mortgage being before the court. Harshbarger v. Rankin, 50 Idaho 24, 293 P. 327 (1930).

Statute of Limitations.

If remedy upon a note is barred by the statute of limitations, remedy upon a mortgage securing note is also barred. Law v. Spence, 5 Idaho 244, 48 P. 282 (1897).

Where mortgage contract contains an acceleration clause, positive in its terms and without any optional features in it, the statute of limitations as to the whole debt begins to run from a default under such acceleration clause. Canadian Birkbeck Inv. & Sav. Co. v. Williamson, 32 Idaho 624, 186 P. 916 (1920).

Whatever prevents the running of the statute of limitations as to debt also prevents its running as to mortgage lien. Dighton v. First Exch. Nat'l Bank, 33 Idaho 273, 192 P. 832 (1920).

Grantee of mortgagor, although not obligated to pay the debt, who has acquired mortgagor's interest in the mortgaged premises before foreclosure was barred, cannot plead statute of limitations, if debtor has, by continued absence from the state, suspended period of limitation with respect to the debt. International Mtg. Bank v. Barghoorn, 43 Idaho 24, 248 P. 868 (1926).

Neither this section nor § 6-108 require a mortgagee to bring a foreclosure action immediately after a default; § 5-214A permits an action for the foreclosure of a real estate mortgage to be brought within five years of the date of maturity. Isaak v. Idaho First Nat'l Bank, 119 Idaho 907, 811 P.2d 832 (1991).

Title Not Vested in Mortgagee.

The execution of a negotiable note, which was not a title-retaining note and which contained no reference to any conditional sales contract, but was secured by mortgage on real and personal property, was in conflict with the theory that the title to the property, or any part thereof covered by the mortgage, rested in the mortgagee, and the taking of mortgage vested title in the vendee. Birkeland v. Clearwater Concentrating Co., 64 Idaho 122, 127 P.2d 1047 (1942).

Vendor's Liens.

The legislative policies underlying the mortgage foreclosure statutes should guide the court's exercise of its equitable powers when enforcing a vendor's lien; therefore, protections paralleling those given mortgagors are appropriate and may be provided in equity, where sellers of real property assert the existence of vendor's liens. Quintana v. Anthony, 109 Idaho 977, 712 P.2d 678 (Ct. App. 1985).

Writ of Assistance.

Writ of assistance is the appropriate remedy to place in possession the purchaser at a foreclosure sale and may be issued against any and all persons concluded by such judgment. Harding v. Harker, 17 Idaho 341, 105 P. 788 (1909); Eagle Rock Corp. v. Idamont Hotel Co., 60 Idaho 639, 95 P.2d 838 (1939).

In Idaho the power of the court to issue a writ of assistance does not arise from any statute, but from the practice which obtained at common law. Williams v. Sherman, 35 Idaho 169, 205 P. 259 (1922); Eagle Rock Corp. v. Idamont Hotel Co., 60 Idaho 639, 95 P.2d 838 (1939).

The power to issue a writ of assistance has always been exercised by courts of equity to place a purchaser of mortgaged premises in possession, after a decree of foreclosure, the expiration of the period of redemption, and the execution and delivery of the sheriff's deed, where the possession is withheld by any party bound by the decree. Williams v. Sherman, 35 Idaho 169, 205 P. 259 (1922);

Eagle Rock Corp. v. Idamont Hotel Co., 60 Idaho 639, 95 P.2d 838 (1939).

A writ of assistance is a discretionary judicial act and cannot be issued by the clerk of the court on his own authority. Williams v. Sherman, 35 Idaho 169, 205 P. 259 (1922).

A writ of assistance is a form of process issued by a court of equity to transfer the possession of property, and more specifically lands, the title or right to which it has previously adjudicated, as a means of enforcing its decree. Eagle Rock Corp. v. Idamont Hotel Co., 60 Idaho 639, 95 P.2d 838 (1939).

The sole question to be determined on a motion for a writ of assistance is whether the applicant has a right, as against the party in possession, to use the writ to obtain possession. Eagle Rock Corp. v. Idamont Hotel Co., 60 Idaho 639, 95 P.2d 838 (1939).

Cited in: Feeney v. Chester, 7 Idaho 324, 63 P. 192 (1900); Mills v. Smiley, 9 Idaho 317, 76 P. 783 (1903); Kelley v. Clark, 23 Idaho 1, 129 P. 921 (1912); Kendrick State Bank v. Barnum, 31 Idaho 562, 173 P. 1144 (1918); Moody v. Morris-Roberts Co., 38 Idaho 414, 226 P. 278 (1923); Prudential Ins. Co. v. Folsom, 48 Idaho 538, 283 P. 609 (1929); Evans v. City of Am. Falls, 52 Idaho 7, 11 P.2d 363 (1932); Gem Valley Ranches, Inc. v. Small, 92 Idaho 232, 440 P.2d 352 (1968); Ingle v. Perkins, 95 Idaho 416, 510 P.2d 480 (1973); Thompson v. Dalton, 95 Idaho 785, 520 P.2d 240 (1974); Ellis v. Butterfield, 98 Idaho 644, 570 P.2d 1334 (1977); Wilson v. Hambleton, 109 Idaho 198, 706 P.2d 87 (Ct. App. 1985); Parsons v. Idaho State Tax Comm'n, 110 Idaho 572, 716 P.2d 1344 (Ct. App. 1986); Great S.W. Life Ins. Co. v. Frazier, 860 F.2d 896 (9th Cir. 1988).

RESEARCH REFERENCES

Am. Jur. — 51 Am. Jur. 2d, Liens, §§ 83 to 94.

55 Am. Jur. 2d, Mortgages, § 573 et seq.

C.J.S. — 53 C.J.S., Liens, § 46 et seq.

59A C.J.S., Mortgages, § 873 et seq.

A.L.R. — Rights of holder of "first refusal" option on real property in event of sale at foreclosure or other involuntary sale. 17 A.L.R.3d 962.

Family allowance from decedent's estate as exempt from attachment, garnishment, execution, and foreclosure. 27 A.L.R.3d 863.

Right of junior mortgagee, whose mortgage covers only a part of land subject to first mortgage to redeem pro tanto, where he was not bound by foreclosure sale. 46 A.L.R.3d 1362.

Mortgagor's interference with property subject to order of foreclosure and sale as contempt of court. 54 A.L.R.3d 1242.

Failure to keep up insurance as justifying foreclosure under acceleration provision in mortgage or deed of trust. 69 A.L.R.3d 774.

6-102. Disposition of surplus money. — If there be surplus money remaining after payment of the amount due on the mortgage, lien or encumbrance, with costs, the court may cause the same to be paid to the person entitled to it, and in the meantime may direct it to be deposited in court.

History.
C.C.P. 1881, § 469; R.S., R.C., & C.L., § 4521; C.S., § 6950; I.C.A., § 9-102.

JUDICIAL DECISIONS

Jurisdiction of Court.

Upon foreclosure of a mortgage against real estate subject to other liens, the trial court had jurisdiction to order the application of funds remaining after payment of the judgment of the mortgage holder to the satisfaction of such junior liens. Credit Bureau v. Sleight, 92 Idaho 210, 440 P.2d 143 (1968).

Cited in: Ferguson v. Blood, 152 F. 98 (9th Cir. 1907).

RESEARCH REFERENCES

Am. Jur. — 55 Am. Jur. 2d, Mortgages, § 711 et seq.

C.J.S. — 59A C.J.S., Mortgages, §§ 1328 to 1331.

6-103. Partial sales. — If the debt for which the mortgage, lien or encumbrance is held is not all due, but is payable in instalments, whether such debt be evidenced by one (1) or more principal notes or otherwise, such mortgage, lien or encumbrance may be foreclosed, at the election of the holder thereof, for the instalment or instalments due, or for taxes or other charges or obligations which the mortgage provides shall be paid by the mortgagor, and the court may by its judgment direct a sale of the encumbered property or of the equity of defendants therein, or so much thereof as may be necessary, to satisfy the amount due for such instalment, charge or obligation, which sale shall be subject to the unpaid balance of said mortgage, lien or encumbrance not reduced to judgment, and such mortgage, lien or encumbrance shall otherwise remain in full force and effect, and the holder thereof shall have the right to foreclose for the balance of the same or any part thereof, notwithstanding the provisions of section 6-101[, Idaho Code]. The remedy herein provided shall be cumulative and not exclusive. Provided, that no deficiency judgment shall be taken under the second or any subsequent foreclosure under any such mortgage, lien or encumbrance.

History.
C.C.P. 1881, § 470; R.S., R.C., & C.L., § 4522; C.S., § 6951; am. 1927, ch. 155, § 1, p. 209; I.C.A., § 9-103.

STATUTORY NOTES

Compiler's Notes.
The bracketed insertion was added by the compiler to conform to the statutory citation style.

JUDICIAL DECISIONS

Application of Section.
In suit for conversion by mortgagor against holder of chattel mortgage based on sale by sheriff under affidavit of notice and sale prior to alleged default, an instruction in language of this section was erroneous, since this section only authorizes partial sale by order of the court, and hence it does not apply to sale by sheriff under affidavit of notice and sale. Ossmen v. Commercial Credit Corp., 72 Idaho 355, 241 P.2d 351 (1952).

RESEARCH REFERENCES

Am. Jur. — 55 Am. Jur. 2d, Mortgages, § 577.

6-104. Mortgage not a conveyance. — A mortgage of real property shall not be deemed a conveyance, whatever its terms, so as to enable the owner of the mortgage to recover possession of the real property without a foreclosure sale.

History.
R.S., R.C., & C.L., § 4523; C.S., § 6952; I.C.A., § 9-104.

STATUTORY NOTES

Cross References.
Transfers deemed mortgages, § 45-904.

JUDICIAL DECISIONS

Analysis

Appointment of receiver.
Deed not a mortgage.
Repossession without foreclosure prohibited.
Transaction construed as mortgage.

Appointment of Receiver.

Construed with § 8-601, subd. 2, a receiver may, where circumstances justify it, be appointed in foreclosure suit and take possession of property. Westinghouse Elec. & Mfg. Co. v. Idaho Ry., Light & Power Co., 228 F. 972 (D. Idaho 1915).

Deed Not a Mortgage.

Where deed, and the expressed intent of the parties, clearly and unambiguously showed that the deed was not a mortgage, deed should not have been treated as a security instrument under § 6-101 and this section. Kerr Land & Livestock, Inc. v. Glaus, 107 Idaho 767, 692 P.2d 1199 (1984).

Repossession Without Foreclosure Prohibited.

This section prohibits grantee of deed given to secure a debt from repossessing the property without foreclosure. Fond v. McCreery, 55 Idaho 144, 39 P.2d 766 (1934).

Transaction Construed as Mortgage.

A deed absolute on its face, and a separate agreement by grantee for reconveyance of same tract of land upon payment of consideration named in deed by a specified time, bearing same date as deed, constitute together a mortgage. Kelley v. Leachman, 3 Idaho 392, 29 P. 849 (1892); Brown v. Bryan, 5 Idaho 145, 51 P. 995 (1896).

Trust deed executed upon real estate to secure a given debt, payable at specified time, is a mortgage. Brown v. Bryan, 6 Idaho 1, 51 P. 995 (1898).

Where deed, absolute on its face, has been executed to secure payment of debt, and it is clearly and satisfactorily established that the instrument was intended only as security and that it is, therefore, only a mortgage, title to property remains in grantor. Hannah v. Vensel, 19 Idaho 796, 116 P. 115 (1911).

Where transaction in its inception is a mortgage, it will so continue and taking out patent in name of mortgagee will not change nature of transaction. Woodmansee v. Covington, 39 Idaho 749, 230 P. 41 (1924).

On an issue as to whether deed absolute in form was intended as an absolute conveyance or as a mortgage, the test is whether there was a subsisting debt after the conveyance. Dickens v. Heston, 53 Idaho 91, 21 P.2d 905 (1933).

Where defendant's conveyances were accompanied by promissory notes, the grantee granted the grantor option to repurchase for the amount of his indebtedness, and the total amount received by the grantor was only about one-quarter of the value of the property conveyed, the trial court was justified in concluding the conveyances were mortgages rather than absolute conveyances. Gem-Valley Ranches, Inc. v. Small, 90 Idaho 354, 411 P.2d 943 (1966).

RESEARCH REFERENCES

Am. Jur. — 54A Am. Jur. 2d, Mortgages, § 1 et seq.

C.J.S. — 59 C.J.S., Mortgages, § 1 et seq.

6-105. Execution under foreclosure on property in more than one county. — In all actions to foreclose a mortgage or other lien upon real property, where such real property is situated partly in one county and partly in another county, within the state of Idaho, the sheriff of the county in which such action is commenced and where the decree therein is rendered and entered, shall have the power and it is hereby made his duty to enforce execution issued upon such decree in the same manner as if the whole of such real property was situated in the county in which such action was

commenced and where the decree therein was rendered and entered.

History.
1909, p. 171, § 1; reen. C.L., § 4524; C.S., § 6953; I.C.A., § 9-105.

RESEARCH REFERENCES

C.J.S. — 59A C.J.S., Mortgages, § 1122 et seq.

6-106. Duty of clerk on return of execution. — Upon the return of such execution by the sheriff, the clerk of the district court issuing the same shall file such execution as in other cases, and as county recorder shall record said execution and return as in other cases of sales of real property. Immediately after such execution and return has been so recorded, as such county recorder he shall prepare a copy of such execution and return and certify the same, which shall be sent by United States mail, postage prepaid, to the county recorder of the other county or counties in which a portion of such real property is situated, and the county recorder of such county or counties shall record such execution and return with the certificate thereto, as in other cases upon the return of executions where real property has been sold.

History.
1909, p. 171, § 2; reen. C.L., § 4525; C.S., § 6954; I.C.A., § 9-106.

JUDICIAL DECISIONS

Cited in: Evans v. City of Am. Falls, 52 Idaho 7, 11 P.2d 363 (1932).

6-107. Certificates of sale. — The said sheriff making such sale shall make as many certificates of such sale as there are counties in which such real property is situated, adding a sufficient number to deliver one to each purchaser of such real property. The sheriff shall deliver one of such certificates to each purchaser of such real property, and shall file one with the county recorder of the county where such sale was made; and he shall also send one to each of the county recorders of the several counties in which any portion of said real estate is situated, by United States mail, prepaying the postage thereon. Such certificates of sale shall be filed and recorded by the several county recorders as is now provided by law in sales of real property under execution.

History.
1909, p. 171, § 3; reen. C.L., § 4526; C.S., § 6955; I.C.A., § 9-107.

STATUTORY NOTES

Cross References.
Filing of duplicate of certificate of sale in the office of county recorder, § 11-310.

JUDICIAL DECISIONS

Prerequisite for Issuance.
Since a lien against the property in question existed by virtue of the recording of a mortgage, recording a "Judgment and Decree of Foreclosure and Order of Sale" with the county recorder was not required in order to proceed with a sheriff's sale, or issuance of a sheriff's certificate of sale and ultimately a sheriff's deed on foreclosure. Federal Land Bank v. Parsons, 118 Idaho 324, 796 P.2d 533 (Ct. App. 1990).

6-108. Deficiency judgments — Amount restricted. — No court in the state of Idaho shall have jurisdiction to enter a deficiency judgment in any case involving a foreclosure of a mortgage on real property in any amount greater than the difference between the mortgage indebtedness, as determined by the decree, plus costs of foreclosure and sale, and the reasonable value of the mortgaged property, to be determined by the court in the decree upon the taking of evidence of such value.

History.
1933, ch. 150, § 1, p. 229.

STATUTORY NOTES

Cross References.
Only one action for recovery of debt or enforcement of right permitted, § 6-101.

JUDICIAL DECISIONS

Analysis

Collection of debt against mortgagor's successor.
Computation of deficiency.
Deficiency judgments permitted.
Holders of second deed.
Mortgage indebtedness.
Prior liens.
Recordation requirements.
Redemption.
Remedy limited.
Time limitation.
Value of property exceeding mortgage.
Vendor's liens.

Collection of Debt Against Mortgagor's Successor.
A mortgagee was not precluded from suing to collect the entire debt secured by a mortgage where the debt was not due and where there was no basis to foreclose the mortgage at the time the property was sold to a third party by the trustee of prior deeds of trust for less than the fair market value of the property. Idaho Power Co. v. Benj. Houseman Co., 123 Idaho 674, 851 P.2d 970 (1993).

Computation of Deficiency.
If the fair market value of the mortgaged property is greater than the amount expended by a purchaser at the foreclosure sale (including amounts paid to redeem from prior mortgages) then fair market value will be used to compute the amount of the deficiency; if the total price paid to acquire the property is greater than its fair market value, the cost of acquisition will be used to compute any deficiency. Thompson v. Kirsch, 106 Idaho

177, 677 P.2d 490 (Ct. App. 1984).

The fact that foreclosure decree fixes the amount of mortgage indebtedness does not preclude the decree from setting forth a per diem amount of interest which will accrue from the date of the decree to date of sale and does not preclude adding costs of the foreclosure sale in computing the amount of any deficiency judgment. Thompson v. Kirsch, 106 Idaho 177, 677 P.2d 490 (Ct. App. 1984).

Where beneficiaries of deed of trust opted for judicial foreclosure, rather than foreclosure by advertisement and sale, the court properly determined the amount of the deficiency judgment by proceeding under this section, rather than under § 45-1512. Thompson v. Kirsch, 106 Idaho 177, 677 P.2d 490 (Ct. App. 1984).

The correct date for determining the value of real property was the date when the trial court in a foreclosure case determined whether a deficiency judgment should be entered pursuant to this section. Isaak v. Idaho First Nat'l Bank, 119 Idaho 907, 811 P.2d 832 (1991).

Deficiency Judgments Permitted.

The adoption of S.L. 1937, ch. 190, repealing S.L. 1937, ch. 31, which prohibited any court from entering a deficiency judgment, left S.L. 1933, ch. 150, this section, in full force and effect, and the court had the right to enter a deficiency judgment against defendant in a mortgage foreclosure action. Brown v. Deck, 65 Idaho 710, 152 P.2d 587 (1944).

Sufficient evidence in the record existed for the district court to calculate the deficiency where the district court noted that the farm owners admitted that they owed the obligation evidenced by the land contract and promissory note and that the property owners could proceed with the foreclosure on the farm property; following the sale, the proceeds would be applied to the judgment on the promissory notes. Elliott v. Darwin Neibaur Farms, 138 Idaho 774, 69 P.3d 1035, cert. denied, 540 U.S. 1004, 124 S. Ct. 535, 157 L. Ed. 2d 410 (2003).

Holders of Second Deed.

Where the "reasonable value" of the property, as found by the district judge, was the difference between the fair market value and the amount owing on the first deed of trust and the bid by holders of second deed of trust at the sheriff's sale matched the fair market value, less the amount owing on the first deed of trust, the credit allowed to cosigners of second deed against the mortgage indebtedness secured by the second deed of trust was equal to the property's "reasonable value" and holders of second deed were entitled to a deficiency judgment. Thompson v. Kirsch, 106 Idaho 177, 677 P.2d 490 (Ct. App. 1984).

Mortgage Indebtedness.

Any expenses paid after foreclosure decree could not be considered as part of the mortgage indebtedness and expenses could only be considered in computing deficiency judgment if they were bona fide costs of the foreclosure sale. Thompson v. Kirsch, 106 Idaho 177, 677 P.2d 490 (Ct. App. 1984).

The district judge erred by including in the mortgage indebtedness those payments and advances made by the holders of second deed of trust after the entry of the decree of foreclosure; this section requires the court to determine the amount of the mortgage indebtedness in the decree of foreclosure and the decree of foreclosure provides the cut off date for fixing the amount of the mortgage indebtedness. Thompson v. Kirsch, 106 Idaho 177, 677 P.2d 490 (Ct. App. 1984).

Prior Liens.

A purchaser at a mortgage foreclosure sale is presumed to have made allowances for prior liens in making his bid and may not recover payments made in reduction of indebtedness on a prior mortgage made after foreclosure sale. Thompson v. Kirsch, 106 Idaho 177, 677 P.2d 490 (Ct. App. 1984).

Where the amount of a senior mortgagee's lien is less than the judicially determined fair market value of the property, the junior lienholder should be required either to redeem to protect its security or to give credit to the debtor against any deficiency judgment for the difference between the amount realized by the senior mortgagee on the foreclosure sale and the judicially determined fair market value of the property as of the date the junior's redemption right expired. First Sec. Bank v. Stauffer, 112 Idaho 133, 730 P.2d 1053 (Ct. App. 1986).

Recordation Requirements.

If a deficiency judgment is obtained in due course by a mortgagee pursuant to this section, that deficiency judgment would be subject to the recording provisions of § 10-1110; in this way, the law protects property not subject to the mortgage, unless the value of the mortgaged property is exhausted. Federal Land Bank v. Parsons, 118 Idaho 324, 796 P.2d 533 (Ct. App. 1990).

Redemption.

Redemption by a junior mortgagee constitutes a satisfaction of the mortgage debt to the extent of the amount by which the value of the mortgaged property exceeds the sums paid for that redemption. Eastern Idaho Prod. Credit Ass'n v. Placerton, Inc., 100 Idaho 863, 606 P.2d 967 (1980).

Remedy Limited.

Section 6-101 authorizes a single form of action to collect a debt secured by a mortgage;

the mortgage must be foreclosed. A deficiency judgment may be obtained if the foreclosure sale does not satisfy the debt; but the deficiency is limited to the difference between the fair market value of the real property and the amount of the unpaid debt. The creditor may not simply sue on the debt and collect by execution on the judgment. Quintana v. Anthony, 109 Idaho 977, 712 P.2d 678 (Ct. App. 1985).

Time Limitation.

Neither § 6-101 nor this section require a mortgagee to bring a foreclosure action immediately after a default; § 5-214A permits an action for the foreclosure of a real estate mortgage to be brought within five years of the date of maturity. Isaak v. Idaho First Nat'l Bank, 119 Idaho 907, 811 P.2d 832 (1991).

Value of Property Exceeding Mortgage.

Where the fair market value of a farm upon which defendants discontinued making mortgage payments exceeded both the first and second mortgages and the defendants had a legal right to insist the plaintiffs first look to their security for payment on the note, and where the defendants had the right to claim the protection of this section which prohibits a deficiency judgment if the value of the security is equal to or exceeds the mortgage indebtedness, by insisting on a nonrecourse note and a release of individual liability, the defendants obtained no greater rights than they had by statute under the circumstances then existing, and their insistence on retaining these rights could not form the basis of a claim of economic duress. Isaak v. Idaho First Nat'l Bank, 119 Idaho 988, 812 P.2d 295 (Ct. App. 1990).

Vendor's Liens.

The legislative policies underlying the mortgage foreclosure statutes should guide the court's exercise of its equitable powers when enforcing a vendor's lien; therefore, protections paralleling those given mortgagors are appropriate and may be provided in equity, where sellers of real property assert the existence of vendor's liens. Quintana v. Anthony, 109 Idaho 977, 712 P.2d 678 (Ct. App. 1985).

Cited in: Wilson v. Hambleton, 109 Idaho 198, 706 P.2d 87 (Ct. App. 1985); Great S.W. Life Ins. Co. v. Frazier, 860 F.2d 896 (9th Cir. 1988); Frazier v. Neilsen & Co., 115 Idaho 739, 769 P.2d 1111 (1989).

RESEARCH REFERENCES

Am. Jur. — 55 Am. Jur. 2d, Mortgages, § 700 et seq.

C.J.S. — 59A C.J.S., Mortgages, § 1304 et seq.

A.L.R. — Conflict of laws as to application of statute proscribing or limiting availability of action for deficiency after sale of collateral real estate. 44 A.L.R.3d 922.

Effect upon obligation of guarantor or surety of statute forbidding or restricting deficiency judgments. 49 A.L.R.3d 554.

CHAPTER 2

WASTE AND WILFUL TRESPASS ON REAL PROPERTY

SECTION.

6-201. Actions for waste. — If a guardian, tenant for life or years, joint tenant or tenant in common of real property, commit waste thereon, any person aggrieved by the waste may bring an action against him therefor, in which action there may be judgment for treble damages.

History.
C.C.P. 1881, § 472; R.S., R.C., & C.L., § 4530; C.S., § 6957; I.C.A., § 9-201.

STATUTORY NOTES

Cross References.
Criminal offense, trespass and malicious injury to real property, § 18-7001 et seq.
Joinder of causes permitted, Idaho Civil Procedure Rule 18(a).
Judgments affecting land to be recorded with deed records, § 31-2407.
Nuisances, action for abatement and damages, § 52-111.
Restraint of waste pending expiration of period of redemption from execution, § 11-406.
Venue of actions, § 5-401.

JUDICIAL DECISIONS

Analysis

Construction.
Injunctive relief.
Specific finding.
Waste not shown.
Waste shown.

Construction.
The legislative intent in adopting this section was to require, as a prerequisite to an award of treble damages, a finding that the waste was wilfully, wantonly or maliciously committed. Pearson v. Harper, 87 Idaho 245, 392 P.2d 687 (1964).

In an action for waste where the lessor claimed in its complaint that personal property was missing from the leased premises and that it was trying to recover for the waste that had occurred up to the time of trial, these claims were not premature since the facts giving rise to them had already occurred; thus, the trial court's dismissal of the waste claim as premature was incorrect. Consolidated AG of Curry, Inc. v. Rangen, Inc., 128 Idaho 228, 912 P.2d 115 (1996).

Although § 55-311 does not expressly address waste of a lawn, trees and shrubs located on a life estate, the reference to "real property" in this section includes waste of the lawn, trees, and shrubs located on the life estate. Kimbrough v. Reed, 130 Idaho 512, 943 P.2d 1232 (1997).

Injunctive Relief.
Where lessee was not farming the leased real property in a good and farmer-like manner as he covenanted in the lease to do, he was committing waste, and the lessor could seek injunctive relief as well as damages. Olson v. Bedke, 97 Idaho 825, 555 P.2d 156 (1976).

Specific Finding.
It was questionable whether court's legal conclusion as to waste constituted a specific finding of wilful, wanton or malicious conduct on the defendant's part, but, as defendant did not assign error to the court's failure to make such a specific finding and there was substantial, competent evidence establishing waste, award was upheld. Watts v. Krebs, 131 Idaho 616, 962 P.2d 387 (1998).

Waste Not Shown.
Finding in favor of the lessee in a contract dispute action was appropriate because the lessor's waste claim failed since the lessee did not unreasonably injure a deposit. Although the mining of the deposit was not generating the profit that the lessor had desired or hoped for, it nonetheless was the activity contemplated by the contract. Independence Lead Mines Co. v. Hecla Mining Co., 143 Idaho 22, 137 P.3d 409 (2006).

Waste Shown.
Defendant did not dispute that he harvested more than his half share of the timber without the knowledge and consent of his cotenant; therefore, the district court correctly concluded that he committed waste. Watts v. Krebs, 131 Idaho 616, 962 P.2d 387 (1998).

Cited in: In re Brooks, 40 Idaho 432, 233 P. 514 (1925).

RESEARCH REFERENCES

Am. Jur. — 78 Am. Jur. 2d, Waste, § 1 et seq.
C.J.S. — 93 C.J.S., Waste, § 1 et seq.
A.L.R. — What constitutes waste justifying

appointment of receiver of mortgage property.
55 A.L.R.3d 1041.

6-202. Actions for trespass. — Any person who, without permission of the owner, or the owner's agent, enters upon the real property of another person which property is posted with "No Trespassing" signs or other notices of like meaning, spaced at intervals of not less than one (1) notice per six hundred sixty (660) feet along such real property; or who cuts down or carries off any wood or underwood, tree or timber, or girdles, or otherwise injures any tree or timber on the land of another person, or on the street or highway in front of any person's house, village, or city lot, or cultivated grounds; or on the commons or public grounds of or in any city or town, or on the street or highway in front thereof, without lawful authority, is liable to the owner of such land, or to such city or town, for treble the amount of damages which may be assessed therefor or fifty dollars ($50.00), plus a reasonable attorney's fee which shall be taxed as costs, in any civil action brought to enforce the terms of this act if the plaintiff prevails.

History.
C.C.P. 1881, § 473; R.S., R.C., & C.L., § 4531; C.S., § 6958; I.C.A., § 9-202; am. 1976, ch. 155, § 1, p. 553.

STATUTORY NOTES

Cross References.
Transportation of forest products on state highways without proof of ownership, §§ 18-4628, 18-4629.

Compiler's Notes.
The words "this act", in the last sentence, refer to S.L. 1976, ch. 155, compiled as §§ 6-202 and 6-202A.

JUDICIAL DECISIONS

Analysis

Actual damages.
Application.
Award of fees.
Common-law trespass.
Elements of damage claim.
Intention a necessary element.
Mental trespass.
Punitive damages.
Trespass by purchaser in good faith.
Valuation.

Actual Damages.
In an action for timber trespass, the measure of actual damages is based upon the amount of trees taken and the market value of the trees in that area at the time of the taking. Bumgarner v. Bumgarner, 124 Idaho 629, 862 P.2d 321 (Ct. App. 1993).

Application.
This section applies only where the trespass is shown to have been wilfully and intentionally committed. United States v. Chamberlain, 51 F. Supp. 54 (D. Idaho 1943).

This section and § 6-202A, governing trespass, only apply when the trespass is shown to have been wilful and intentional, and the wronged party seeks treble damages therefor; in all other circumstances, the common law principles relating to trespass actions apply. Mock v. Potlatch Corp., 786 F. Supp. 1545 (D. Idaho 1992).

Buyer of the parcel admitted to intentionally logging the sellers' property, relying on his argument that the deed, which included an ambiguous easement, granted him the right to the timber. Sells v. Robinson, 141 Idaho 767, 118 P.3d 99 (2005).

Award of Fees.
Although this section does not expressly provide for fee awards on appeal, neither does it restrict an award, and in this case the

prevailing plaintiff was entitled, under this section, to an award of fees on appeal. Bubak v. Evans, 117 Idaho 510, 788 P.2d 1333 (Ct. App. 1989).

Attorney fees should not be apportioned based upon prevailing theories of recovery, but rather should be awarded based upon application of appropriate standards and factors. Bubak v. Evans, 117 Idaho 510, 788 P.2d 1333 (Ct. App. 1989).

This section mandates the award of a reasonable attorney fee to a plaintiff who prevails in an action brought hereunder, and the amount of the award is to be determined through consideration of the factors articulated in Idaho Civil Procedure Rule 54(e)(3). Bubak v. Evans, 117 Idaho 510, 788 P.2d 1333 (Ct. App. 1989).

Award allocating one-half of all plaintiff's attorney fees to the prosecution of successful trespass claim was within the boundaries of court's discretion. Bumgarner v. Bumgarner, 124 Idaho 629, 862 P.2d 321 (Ct. App. 1993).

In trespass case, reviewing court declined to award the owners attorney fees on appeal because the neighbors had raised valid issues necessitating remand to the district court. Akers v. D. L. White Constr., Inc., 142 Idaho 293, 127 P.3d 196 (2005).

In an easement dispute, attorney's fees were improperly awarded because the owner was unable to collect treble damages due to a failure to post "No Trespassing" signs and a failure to prove damages for lost timber. Ransom v. Topaz Mktg., L.P., 143 Idaho 641, 152 P.3d 2 (2006).

Common-law Trespass.

Fact that party prays in his complaint for treble damages under this section, and before trial waives his demand that damages be trebled, does not preclude him from recovering judgment for actual damages or entitle defendant to a non-suit. Gumaer v. White Pine Lumber Co., 11 Idaho 591, 83 P. 771 (1905).

If plaintiff alleges facts constituting common-law action for cutting and removing timber, but amends, pleading same facts and claiming treble damages under this section, the amendment does not constitute new cause of action for the statute authorizing treble damages in no way affects cause of action, but merely goes to the relief to be granted. Ecklund v. Lewis Lumber Co., 13 Idaho 581, 92 P. 532 (1907).

Action to recover treble damages under this section where it is not alleged that damage was committed wilfully or intentionally does not come within purview of said section, but is good as action at common law which may entitle plaintiff to recover his actual damages. Menasha Woodenware Co. v. Spokane Int'l R.R., 19 Idaho 586, 115 P. 22 (1911).

Elements of Damage Claim.

Two essential elements of plaintiff's claim for damages, i.e., first, the actual amount of timber claimed to have been taken, and secondly, the market value of the timber in that area at the time of the alleged taking, were not established in plaintiff's action praying for treble damages for a timber trespass. Mercer v. Shearer, 84 Idaho 536, 374 P.2d 716 (1962).

Intention a Necessary Element.

This section is not applicable where it is not shown that trespass was wilfully and intentionally committed. Menasha Woodenware Co. v. Spokane Int'l R.R., 19 Idaho 586, 115 P. 22 (1911).

For a plaintiff to be entitled to recover statutory treble damages, instead of merely his actual damages, it is necessary to establish the trespass was wilfully and intentionally committed. Earl v. Fordice, 84 Idaho 542, 374 P.2d 713 (1962).

With respect to trespasses on plaintiff's land, the court concluded that defendant had believed he owned the portion of land in question and that his invasion of plaintiff's property rights was, therefore, not wilful and intentional, but merely negligent; consequently, the court declined to award treble damages for the trespasses involving that portion of property. Bumgarner v. Bumgarner, 124 Idaho 629, 862 P.2d 321 (Ct. App. 1993).

Mental Trespass.

There is no such thing as a mental trespass. Idaho Power Co. v. Buhl, 62 Idaho 351, 111 P.2d 1088 (1941).

Punitive Damages.

The court granted damages for treble the value of the trees that defendant had intentionally and wilfully removed from adjoining landowner's lot; however, this award of statutory damages for the act of taking trees did not prevent the trial court from awarding punitive damages for defendant's conduct in also constructing a road on adjoining landowner's property. Bumgarner v. Bumgarner, 124 Idaho 629, 862 P.2d 321 (Ct. App. 1993).

Trespass by Purchaser in Good Faith.

Where timber cut and removed by defendant from government lands was purchased in good faith for a fair consideration from the party in possession of the land who appeared to be, and represented that he was, the owner thereof, the defendant is not, under these circumstances, liable for treble damages under this section. United States v. Chamberlain, 51 F. Supp. 54 (D. Idaho 1943).

Valuation.

This section does not preclude an action for diminution in property value brought in conjunction with a timber trespass claim, if there

was identifiable loss separate from the removal of the timber. Sells v. Robinson, 141 Idaho 767, 118 P.3d 99 (2005).

Cited in: Dumas v. Ropp, 98 Idaho 61, 558 P.2d 632 (1977); State v. Kelly, 106 Idaho 268, 678 P.2d 60 (Ct. App. 1984); Bernard v. Roby, 112 Idaho 583, 733 P.2d 804 (Ct. App. 1987); Akers v. Mortensen, 147 Idaho 39, 205 P.3d 1175 (2009).

RESEARCH REFERENCES

Am. Jur. — 75 Am. Jur. 2d, Trespass, §§ 4 to 10, 41 et seq.

C.J.S. — 87 C.J.S., Trespass, §§ 160 to 171.

A.L.R. — Statutes of limitation concerning actions of trespass as applicable to actions for injury to property not constituting a common-law trespass. 15 A.L.R.3d 1228.

Forfeiture of life estate for waste. 16 A.L.R.3d 1344.

Award of or pending proceedings for compensation for property condemned as precluding action for damages arising from prior trespasses upon it. 33 A.L.R.3d 1132.

Right of contingent remainderman to maintain action for damages for waste. 56 A.L.R.3d 677.

6-202A. Definition of terms. — As used in section 6-202, Idaho Code, "enters" and "entry" mean going upon or over real property, either in person or by causing any object, substance or force to go upon or over real property.

History.

I.C., § 6-202A, as added by 1976, ch. 155, § 2, p. 553.

STATUTORY NOTES

Effective Dates.

Section 4 of S.L. 1976, ch. 155 declared an emergency. Approved March 17, 1976.

JUDICIAL DECISIONS

Wilful and Intentional.

Section 6-202 and this section, governing trespass, only apply when the trespass is shown to have been wilful and intentional, and the wronged party seeks treble damages therefor; in all other circumstances, the common law principles relating to trespass actions apply. Mock v. Potlatch Corp., 786 F. Supp. 1545 (D. Idaho 1992).

6-203. Limitations regarding recovery for actions for trespass. [Repealed.]

STATUTORY NOTES

Compiler's Notes.

This section, which comprised C.C.P. 1881, § 474; R.S., R.C., & C.L., § 4532; C.S., § 6959; I.C.A., § 9-203, was repealed by S.L. 1976, ch. 155, § 3.

6-204 — 6-209. [Reserved.]

6-210. Recovery of damages for economic loss willfully caused by a minor. — (1) Any person shall be entitled to recover damages in an amount not to exceed two thousand five hundred dollars ($2,500) in a court of competent jurisdiction from the parents of any minor, under the age of eighteen (18) years, living with the parents, who shall willfully cause

economic loss to such person, except as otherwise provided in section 49-310, Idaho Code. "Person" means any municipal corporation, county, city school district, or any individual, partnership, corporation or association, or any religious organization, whether incorporated or unincorporated.

(2) Economic loss shall include, but not be limited to, the value of property, as that term is defined in section 18-2402(8), Idaho Code, taken, destroyed, broken or otherwise harmed, lost wages and direct out-of-pocket losses or expenses such as medical expenses resulting from the minor's willful conduct, but shall not include less tangible damage such as pain and suffering, wrongful death or emotional distress.

(3) As used in this section, "parents" shall mean any persons or entities who have legal custody of the minor, or any persons or entities who are licensed to accept children for child care under chapter 12, title 39, Idaho Code. "Legal custody" shall be as that term is defined in section 16-2002, Idaho Code.

(4) In the event the parents are providing foster care for the minor at the time of the minor's willful act, and the parents are licensed pursuant to section 39-1211, Idaho Code [chapter 12, title 39, Idaho Code], and the minor is in the legal custody of the department of health and welfare, any person is entitled to recover damages in a court of competent jurisdiction within the above stated limits. Such recovery shall be insured by the state of Idaho.

History.

1957, ch. 32, § 1, p. 51; am. 1977, ch. 55, § 1, p. 106; am. 1987, ch. 257, § 1, p. 522; am. 1990, ch. 81, § 1, p. 163; am. 1991, ch. 168, § 1, p. 408; am. 2005, ch. 391, § 1, p. 1263.

STATUTORY NOTES

Compiler's Notes.

The bracketed insertion in subsection (4) was added by the compiler to suggest an alternative for an obviously incorrect reference.

JUDICIAL DECISIONS

ANALYSIS

Effect of section.
Parents' duty.

Effect of Section.

The effect of this section is to prohibit imposing vicarious liability upon the parents for a child's negligent conduct. Fuller v. Studer, 122 Idaho 251, 833 P.2d 109 (1992).

Parents' Duty.

A parent who has knowledge of a minor child's propensity for a particular type of harmful conduct is under an affirmative duty to guard against the foreseeable consequences of that specific propensity. Thus, this duty requires a two-step analysis. First, the court must look to see whether a parent has knowledge of a minor child's propensity or proclivity for a specific harmful conduct. If the first step is answered affirmatively, then it must be determined whether the parent took reasonable steps to guard against the foreseeable consequences of the minor child's propensity for the specific harmful conduct. Fuller v. Studer, 122 Idaho 251, 833 P.2d 109 (1992).

Where plaintiff's damages exceeded the limits under state law for recovery from a juvenile's parents in a civil action, the liability of the parents for payment of a restitution award did not constitute a fine, penalty, or forfeiture. Mabey v. Ellis, 224 Bankr. 786 (Bankr. D. Idaho 1998).

6-211. Trespass on state lands — Damage actions. — Any person who cuts down or carries off any wood, trees, or timber or removes top soil from, or dumps trash or debris on, any land belonging to the State of Idaho without lawful authority is liable to the State of Idaho for treble the amount of damages, which amount may be recovered in a civil action therefor.

History.
1949, ch. 105, § 1, p. 194.

RESEARCH REFERENCES

Am. Jur. — 75 Am. Jur. 2d, Trespass, § 48 et seq.

6-212. Damages recovered deposited into endowment fund. — Any moneys so recovered shall in each instance be deposited in the endowment fund in which would be deposited the proceeds of the sale of the lands damaged were such lands sold by the State of Idaho.

History.
1949, ch. 105, § 2, p. 194.

STATUTORY NOTES

Cross References.
Agricultural college permanent endowment fund, § 33-2193.
Capitol permanent endowment fund, § 67-1610.
Charitable institutions permanent endowment fund, § 66-1103.
Mental hospital permanent endowment fund, § 66-1101.
Normal school permanent endowment fund, § 33-3301.
Pentitentiary permanent endowment fund, § 20-102.
Public school permanent endowment fund, Idaho Const., art. IX, § 4, § 33-902.
Scientific school permanent endowment fund, § 33-2911.
University permanent endowment fund, § 33-2909.

CHAPTER 3

FORCIBLE ENTRY AND UNLAWFUL DETAINER

SECTION.

6-301. Forcible entry defined. — Every person is guilty of a forcible entry who either:

1. By breaking open doors, windows or other parts of a house, or by any kind of violence or circumstances of terror, enters upon or into any real property; or,

2. Who, after entering peaceably upon real property, turns out, by force, threats or menacing conduct, the party in possession.

History.
C.C.P. 1881, § 795; R.S., R.C., & C.L., § 5091; C.S., § 7320; I.C.A., § 9-301.

STATUTORY NOTES

Cross References.
Reentry of dispossessed person on real property a contempt, § 7-602.
Sheriff's fee for serving writ of possession or restitution, putting person in possession of premises and removing occupant, § 31-3203.
Unknown owners or heirs as parties, § 5-326.
Venue of actions, § 5-401.

JUDICIAL DECISIONS

Analysis

Holding over after sale.
Joinder with personal injury.
Judgment.
Retaliatory eviction.
Trespass distinguished.

Holding Over After Sale.
Where grantor of quitclaim deed to motel remained on premises by paying rent and, upon failure to pay rent for three months, received eviction notice from grantee who subsequently had grantor's personal effects placed in storage, court held grantee was not liable to grantor for forcible entry. Rowe v. Burrup, 95 Idaho 747, 518 P.2d 1386 (1974).

Joinder with Personal Injury.
Action for forcible entry or detainer can not be joined with cause of action for injury to person or character. Dahlquist v. Mattson, 40 Idaho 378, 233 P. 883 (1925).

Judgment.
In an action for forcible entry and forcible detainer, judgment should be for restitution of premises with damages occasioned by any forcible entry or any forcible detainer. Dahlquist v. Mattson, 40 Idaho 378, 233 P. 883 (1925).

Retaliatory Eviction.
Retaliatory eviction is an affirmative defense available to tenants. A landlord's request for eviction of a tenant under §§ 6-301 through 6-316 may be defeated by a showing that the primary motive for the eviction is retaliation against the tenant for reporting violations of housing or safety codes to authorities and seeking specific performance of repairs under § 6-320. The tenant will carry the burden to prove the retaliatory nature of the eviction. Wright v. Brady, 126 Idaho 671, 889 P.2d 105 (Ct. App. 1995).

Trespass Distinguished.
Gist of trespass is injury to possession; forcible entry or forcible detainer is something more than mere trespass. Dahlquist v. Mattson, 40 Idaho 378, 233 P. 883 (1925).

Cited in: Howerton v. Gabica, 708 F.2d 380 (9th Cir. 1983); Rayl v. Shull Enters., Inc., 108 Idaho 524, 700 P.2d 567 (1985).

RESEARCH REFERENCES

Am. Jur. — 35A Am. Jur. 2d, Forcible Entry and Detainer, §§ 1 to 34.

C.J.S. — 36A C.J.S., Forcible Entry and Detainer, §§ 1 to 20, 42 to 62.

6-302. Forcible detainer defined. — Every person is guilty of a forcible detainer who either:

1. By force, or by menaces and threats of violence, unlawfully holds and keeps possession of any real property, whether the same was acquired peacefully or otherwise; or,

2. Who, in the nighttime, or during the absence of the occupant of any lands, unlawfully enters upon real property, and who, after demand made for the surrender thereof, for the period of five (5) days, refuses to surrender the same to such former occupant. The occupant of real property, within the meaning of this subdivision, is one who, within five (5) days preceding such unlawful entry, was in the peaceable and undisturbed possession of such lands.

History.
C.C.P. 1881, § 796; R.S., R.C., & C.L., § 5092; C.S., § 7321; I.C.A., § 9-302.

RESEARCH REFERENCES

Am. Jur. — 35A Am. Jur. 2d, Forcible Entry and Detainer, §§ 1 to 34.

C.J.S. — 36A C.J.S., Forcible Entry and Detainer, §§ 1 to 20.

6-303. Unlawful detainer defined. — A tenant of real property, for a term less than life, is guilty of an unlawful detainer:

1. When he continues in possession, in person or by subtenant, of the property, or any part thereof, after the expiration of the term for which it is let to him, without the permission of his landlord, or the successor in estate of his landlord, if any there be; but in case of a tenancy at will, it must first be terminated by notice, as prescribed in the civil code.

2. Where he continues in possession, in person or by subtenant, without permission of his landlord, or the successor in estate of his landlord, if any there be, after default in the payment of rent, pursuant to the lease or agreement under which the property is held, and three (3) days' notice, in writing, requiring its payment, stating the amount which is due, or possession of the property, shall have been served upon him, and if there be a subtenant in actual occupation of the premises, also upon such subtenant. Such notice may be served at any time within one (1) year after the rent becomes due. In all cases of tenancy upon agricultural lands, where the tenant has held over and retained possession for more than sixty (60) days after the expiration of his term without any demand of possession or notice to quit by the landlord, or the successor in estate of his landlord, if any there be, he shall be deemed to be holding by permission of the landlord, or the successor in estate of his landlord, if any there be, and shall be entitled to hold under the terms of the lease for another full year, and shall not be guilty of an unlawful detainer during said year, and such holding over for the period aforesaid shall be taken and construed as a consent on the part of a tenant to hold for another year.

3. Where he continues in possession in person, or by subtenants, after a neglect or failure to perform other conditions or covenants of the lease or agreement under which the property is held, including any covenant not to

assign or sublet, than the one for payment of rent, and three (3) days' notice, in writing, requiring the performance of such conditions or covenants, or the possession of the property, shall have been served upon him, and if there be a subtenant in actual occupation of the premises, also upon such subtenant. Within three (3) days after the service of the notice, the tenant, or any subtenant in actual occupation of the premises, or any mortgagee of the term, or other person interested in its continuance, may perform the conditions or covenants of the lease, or pay the stipulated rent, as the case may be, and thereby save the lease from forfeiture: provided, if the covenants and conditions of the lease, violated by the lessee, can not afterward be performed, then no notice, as last prescribed herein, need be given to said lessee or his subtenant demanding the performance of the violated covenant or conditions of the lease. A tenant may take proceedings similar to those prescribed in this chapter, to obtain possession of premises let to an undertenant, in case of his unlawful detention of the premises underlet to him.

4. A tenant or subtenant, assigning or subletting, or committing waste upon, the demised premises contrary to the covenants of his lease, thereby terminates the lease, and the landlord, or his successor in estate, shall, upon service of three (3) days' notice to quit upon the person or persons in possession, be entitled to restitution of possession of such demised premises under the provisions of this chapter.

5. If any person is, or has been, engaged in the unlawful delivery, production or use of a controlled substance on the premises of the leased property during the term for which the premises are let to the tenant. For purposes of this chapter, the terms "delivery," "production," and "controlled substance" shall be defined as set forth in section 37-2701, Idaho Code.

History.
C.C.P. 1881, § 797; R.S., R.C., & C.L., § 5093; C.S., § 7322; I.C.A., § 9-303; am. 2001, ch. 203, § 1, p. 691.

STATUTORY NOTES

Cross References.
Lessee may continue lease by payment of judgment in unlawful detainer for non-payment of rent, § 6-316.
Termination of tenancy at will, § 55-208.

Compiler's Notes.
The Civil Code, referred to at the end of subdivision 1, is the Code of Civil Procedure, a division of the Idaho Code, consisting of Titles 1 through 13.

JUDICIAL DECISIONS

Analysis

Agricultural lands.
Application.
Attorney's fees.
Choice of remedies.
Effect of contractual agreement.
Effect of security.
Effect on lease.
Extension of lease.
Failure to give notice.
Insufficient allegation of lease.
Legality of foreclosure proceedings not tested.
Misjoinder of causes.

Nature of remedy.
Purchase contract.
Right to resort to remedy.
Sufficiency of notice.
Tenants at will.
Waiver of breach of lease.
Waiver of notice.

Agricultural Lands.

This section does not exempt tenants of agricultural lands from unlawful detainer. Johnston v. Schmidt, 76 Idaho 470, 285 P.2d 476 (1955).

Where a tenant under a farm lease was late in paying his rent and the landlord, without demanding timely payment or giving any notice to the tenant, reentered the property, the failure to make a timely rental payment did not work a forfeiture and the tenant retained his rights under the lease including his option to purchase. Schlegel v. Hansen, 98 Idaho 614, 570 P.2d 292 (1977).

Application.

Fact that lease was to expire in two years if plaintiff failed to sub-lease to defendants, shows that extension agreement between landlord and plaintiff for five years was made expressly for defendant's benefit, and that possession by it during the remaining months of the extended term, was not such possession as to be drawn within the purview of this section. Knight v. Fox Caldwell Theatres Corp., 70 Idaho 148, 212 P.2d 1027 (1949).

As long as a tenant remains in possession of premises and holds over term provided by the lease, which also provides for payment of a fixed sum for each day of holding over, he is still within the purview of the statute allowing him to remove his property "any time during the continuance of his term." Pearson v. Harper, 87 Idaho 245, 392 P.2d 687 (1964).

Provision in lease requiring payment of $10.00 per day during the time possession is withheld following default and 30 day notice is indicative of tenant's intent upon holding over; therefore, even though terms of the lease had expired, his possession was not more than a continuance of the original term, and tenant was entitled to remove trade fixtures which had not become an integral part of the premises and which could be removed without injury to the premises. Pearson v. Harper, 87 Idaho 245, 392 P.2d 687 (1964).

Where lease contract contained a clause that the lessors had the right to sell and the lessees had first option to buy during the tenancy and, if lessees failed to exercise the option, the sale of the property would automatically terminate the lease, the lessees were liable for unlawful detainer when they refused to quit the property after demand of possession, notice to quit, and the sale of the property to a third person by the lessors. Willmore v. Christensen, 94 Idaho 262, 486 P.2d 273 (1971).

Attorney's Fees.

Where finding, that tenant was guilty of unlawful detainer of property under this section, was supported by substantial, competent evidence, the attorney fee award to the landowners under § 6-324 was proper. Hettinga v. Sybrandy, 126 Idaho 467, 886 P.2d 772 (1994).

Choice of Remedies.

Where a lease agreement contained a very definitive contractual right to terminate the lease upon default of the lessee, the lessor had a choice of pursuing either its contractual or statutory remedy. Riverside Dev. Co. v. Ritchie, 103 Idaho 515, 650 P.2d 657 (1982).

A lessor's contractual right to forfeiture must be clearly stipulated in order to be enforceable but, even absent a contractual forfeiture remedy, the statutory remedy is still available in an unlawful detainer action; absent a clear contractual right to declare forfeiture, a landlord may not, without the express consent of a tenant, repossess his property without resorting to remedies provided in the unlawful detainer statutes. Riverside Dev. Co. v. Ritchie, 103 Idaho 515, 650 P.2d 657 (1982).

Effect of Contractual Agreement.

The parties to a real estate lease are entitled to negotiate default, termination and notice provisions affording the tenant greater protection than those prescribed by this section and, when the parties agree to such provisions, their agreement is binding; thus, landlords' failure to comply with the 30-day notice provision of the lease before evicting tenant was not excused by subdivision 4. of this section. Galindo v. Hibbard, 106 Idaho 302, 678 P.2d 94 (Ct. App. 1984).

Effect of Security.

The fact the landlord has security for his rent does not prevent him from having recourse to the remedy of unlawful detainer for restitution of the premises, even though he has begun foreclosure proceedings to recover the rent due. Swanson v. Olson, 38 Idaho 24, 220 P. 407 (1923).

Effect on Lease.

Service of notice under this section, together with commencement of action for un-

lawful detainer, based on tenant's failure to pay rent when due, does not primarily terminate or forfeit lease; but payment of rent due, together with interest, damages and costs at any time within five days after judgment, as provided in § 6-316, keeps lease alive and saves it from forfeiture. Hunter v. Porter, 10 Idaho 72, 77 P. 434 (1904).

Extension of Lease.

The holding over for more than sixty (60) days by the lessee of agricultural lands operated to extend the lease for another year but did not extend an option to purchase within a certain time contained in the lease. Southern v. Southern, 92 Idaho 180, 438 P.2d 925 (1968).

Failure to Give Notice.

Subdivision 2. of this section requires that a landlord notify, in writing, an individual who is behind in his or her rent before the injured landlord can resort to an action for possession, under § 6-310, or damages, under § 6-311E; however, until written notice is given, the nonpaying tenant is not viewed by the law as unlawfully detaining the rented premises. State v. Johnson, 110 Idaho 516, 716 P.2d 1288 (1986).

Where there was no evidence that the defendant's landlord ever gave the defendant written notice of nonpayment of rent as spelled out by subdivision 2. of this section and § 6-304, the defendant's occupancy of the rented premises was legal. State v. Johnson, 110 Idaho 516, 716 P.2d 1288 (1986).

Insufficient Allegation of Lease.

In an action for restitution of agricultural lands, where defendants were served with a statutory notice to quit within sixty (60) days succeeding the termination of a renewed lease, defendants' allegation that they continued to remain in possession under the terms of the lease and did work on the land with consent of plaintiffs was insufficient to allege a "lease," oral or written and failed to state an affirmative defense. Abbl v. Morrison, 64 Idaho 489, 134 P.2d 94 (1943).

Legality of Foreclosure Proceedings Not Tested.

The legality of proceedings to foreclose chattel mortgage given as security for rent is not subject to be drawn in question as within the purview of unlawful detainer action. Swanson v. Olsen, 38 Idaho 24, 220 P. 407 (1923).

Misjoinder of Causes.

Complaint which, in addition to unlawful detainer, attempts to state cause of action in equity and for money judgment for breach of sale agreement is defective for misjoinder, and objection may be taken by special demurrer. Coe v. Bennett, 39 Idaho 176, 226 P. 736 (1924).

Nature of Remedy.

Action under this section is summary proceeding and cannot be maintained unless conventional relation of landlord and tenant exists between parties, so that tenant is estopped to deny title. Coe v. Bennett, 39 Idaho 176, 226 P. 736 (1924).

Title is not involved in an unlawful detainer suit, but the sole question involved is right of possession, and no other issues may be injected. Richardson v. King, 51 Idaho 762, 10 P.2d 323 (1932); Loughray v. Weitzel, 94 Idaho 833, 498 P.2d 1306 (1972).

No landlord/tenant relationship existed between the beneficiaries and trustees, so that no basis existed for an unlawful detainer action. Findings by the court regarding the nature of the beneficiaries' ownership interest were beyond the scope of an unlawful detainer action and should not have been considered. Carter v. Zollinger, 146 Idaho 842, 203 P.3d 1241 (2009).

Purchase Contract.

One in possession of ranch as buyer under a contract of sale which became unenforceable because of failure of a condition precedent did not, thereby, come to have a landlord-tenant relationship with the seller to which could be applied the concept of unlawful detainer, notwithstanding that forfeiture clause in contract provided for this in event of failure of buyer to surrender possession of premises upon default. Mecham v. Nelson, 92 Idaho 783, 451 P.2d 529 (1969).

Right to Resort to Remedy.

Fact that lease reserves to landlord an option to terminate same upon service of a thirty-day notice after breach of covenant by tenant does not preclude landlord from resorting to remedy prescribed by this section in case tenant fails to pay rent when due. Hunter v. Porter, 10 Idaho 72, 77 P. 434 (1904).

When there is no evidence to show relation of landlord and tenant or that delay of petitioner in seeking possession of the land was prejudicial, party cannot claim advantages of this section. Noble v. Harris, 33 Idaho 401, 195 P. 543 (1921).

Landlord having security for his rent may resort to remedy of unlawful detainer, although he has begun foreclosure proceedings to recover rent due. Swanson v. Olsen, 38 Idaho 24, 220 P. 407 (1923).

Party in possession under contract of sale does not, after default in payment, become tenant at will subject to removal in action of unlawful detainer. Coe v. Bennett, 39 Idaho 176, 226 P. 736 (1924).

Failure of tenant to comply with notice to

quit results only in forfeiture of lease and does not operate to end relationship of landlord and tenant; there must be surrender by tenant or failure to satisfy judgment of unlawful detainer within five days after its rendition. Hoebel v. Raymond, 46 Idaho 55, 266 P. 433 (1928).

Sufficiency of Notice.

Notice directed to tenant signed by his landlord, requiring tenant to pay rent in sum specified for a certain term or to deliver up possession of premises, describing them, and stating that landlord will institute legal proceedings to recover possession with treble rent in case of noncompliance with notice, is sufficient under this section. Hunter v. Porter, 10 Idaho 72, 77 P. 434 (1904).

This section does not require that demand for possession or notice give any stipulated time for surrender of possession. Johnston v. Schmidt, 76 Idaho 470, 285 P.2d 476 (1955).

Where the lessor gave the lessee notice of default on May 20, 1977, for his failure to pay the May, 1977, minimum rent and on June 22, 1977, the lessee had not cured the default, and the lessor sent a notice of termination, the lessee had more than the 30 days permitted in the lease to cure the default; and, since no reentry was attempted by the lessor within three days of the termination notice, the notice requirement of § 55-210 was met. Riverside Dev. Co. v. Ritchie, 103 Idaho 515, 650 P.2d 657 (1982).

Tenants at Will.

A tenant who holds over after expiration of his lease violates this section and is not a tenant at will. Johnston v. Schmidt, 76 Idaho 470, 285 P.2d 476 (1955).

Waiver of Breach of Lease.

A continuing course of conduct by a lessor which misleads a lessee to his prejudice in regard to the lessor's intent to strictly enforce the terms of the lease may constitute a waiver. However, a lessor should certainly not be precluded from terminating a lease for the late payment of rent or other obligation simply because he has been lenient on prior occasions in accepting late rent. Riverside Dev. Co. v. Ritchie, 103 Idaho 515, 650 P.2d 657 (1982).

Acceptance of rent accruing subsequent to a breach is a well recognized form of conduct which may establish a lessor's intent to waive a breach of a lease agreement. However, where the lessor takes definite action to terminate the lease by sending notice of termination and, thereafter, proceeds within a reasonable time to regain possession of the premises, but nevertheless also accepts rent subsequent to the notice of termination, the intent of the lessor to waive the breach by his acceptance of rent is far from clear. Riverside Dev. Co. v. Ritchie, 103 Idaho 515, 650 P.2d 657 (1982).

Waiver of Notice.

Where the landlord sold the farm and the tenant observed the new owner make preparations for farming without objection thereto, advertised his equipment for sale "as we are leaving the farm," sold much of his equipment, household furniture, and dairy cattle, attempted to buy a farm in Missouri, and made no objection to the new owner's activities on the property until planting had been started by him, the tenant waived his right to termination notice under this section. Iest v. Gartin, 90 Idaho 246, 409 P.2d 490 (1965).

Cited in: Seeley v. Security Nat'l Bank, 40 Idaho 574, 235 P. 976 (1925); Zimmerman v. Craig, 48 Idaho 478, 282 P. 940 (1929); Brooks v. Coppedge, 71 Idaho 166, 228 P.2d 248 (1951); Boesiger v. Freer, 85 Idaho 551, 381 P.2d 802 (1963); Pearson v. Harper, 87 Idaho 245, 392 P.2d 687 (1964); Enders v. Wesley W. Hubbard & Sons, 95 Idaho 590, 513 P.2d 992 (1973); Olson v. Bedke, 97 Idaho 825, 555 P.2d 156 (1976); Howerton v. Gabica, 708 F.2d 380 (9th Cir. 1983); Lewiston Pre-Mix Concrete, Inc. v. Rohde, 110 Idaho 640, 718 P.2d 551 (Ct. App. 1985).

RESEARCH REFERENCES

Am. Jur. — 35A Am. Jur. 2d, Forcible Entry and Detainer, §§ 1 to 34.

C.J.S. — 36A C.J.S., Forcible Entry and Detainer, §§ 1 to 20.

A.L.R. — Right of landlord legally entitled to possession to dispossess tenant without legal process. 6 A.L.R.3d 177.

6-304. Service of notice. — The notices required by the preceding section may be served either:

1. By delivering a copy to the tenant personally; or,

2. If he be absent from his place of residence and from his usual place of business, by leaving a copy with some person of suitable age and discretion at either place, and sending a copy through the mail addressed to the tenant

at his place of residence; or, if such place of residence and business can not be ascertained, or a person of suitable age or discretion can not be found there, then by affixing a copy in a conspicuous place on the property, and also delivering a copy to a person there residing, if such person can be found; and also sending a copy through the mail addressed to the tenant at the place where the property is situated. Service upon a subtenant may be made in the same manner.

History.
C.C.P. 1881, § 798; R.S., R.C., & C.L., § 5094; C.S., § 7323; I.C.A., § 9-304.

JUDICIAL DECISIONS

ANALYSIS

Damages for entry by landlord.
Failure to give notice.
Substantial compliance.
Termination of relationship.

Damages for Entry by Landlord.

Where landlord was entitled to a share of crop of apples as rent, his entry to harvest and pack apples involved only a question of what damages, if any, tenant suffered because of such entry. Muegerl v. Hawley, 49 Idaho 790, 292 P. 242 (1930).

Damages can not be litigated under a counterclaim or cross-complaint in an unlawful detainer action. Fry v. Weyen, 58 Idaho 181, 70 P.2d 359 (1937).

Evidence to show damages was not admissible as a defense in an unlawful detainer action. Fry v. Weyen, 58 Idaho 181, 70 P.2d 359 (1937).

Failure to Give Notice.

Where there was no evidence that the defendant's landlord ever gave the defendant written notice of nonpayment of rent as spelled out by subdivision 2 of § 6-303 and this section, the defendant's occupancy of the rented premises was legal. State v. Johnson, 110 Idaho 516, 716 P.2d 1288 (1986).

Substantial Compliance.

Notice by landlord to his tenant, requiring tenant to pay rent due or surrender possession, describing premises and naming amount due, is a substantial compliance with this section. Hunter v. Porter, 10 Idaho 72, 77 P. 434 (1904).

It was unnecessary to pass upon appellant's contention that the notice to quit was not served in accordance with statute, where appellant admits and the record shows that he personally received the notice. Fry v. Weyen, 58 Idaho 181, 70 P.2d 359 (1937).

Termination of Relationship.

Service of notice to quit, but not complied with by tenant, does not end relationship of landlord and tenant. Hoebel v. Raymond, 46 Idaho 55, 266 P. 433 (1928).

RESEARCH REFERENCES

Am. Jur. — 35A Am. Jur. 2d, Forcible Entry and Detainer, §§ 39, 40.

C.J.S. — 36A C.J.S., Forcible Entry and Detainer, §§ 29 to 31.

6-305. Jurisdiction of district court. — The district court of the county in which the property, or some part of it, is situated, has jurisdiction of proceedings under this chapter.

History.
C.C.P. 1881, § 799; R.S., R.C., & C.L., § 5095; C.S., § 7324; I.C.A., § 9-305.

RESEARCH REFERENCES

Am. Jur. — 35A Am. Jur. 2d, Forcible Entry and Detainer, §§ 35 to 32.

C.J.S. — 36A C.J.S., Forcible Entry and Detainer, §§ 37 to 39.

6-306, 6-307. Jurisdiction of probate court and justices' courts. [Repealed.]

STATUTORY NOTES

Compiler's Notes.
These sections, which comprised C.C.P. 1881, §§ 800, 801; R.S., R.C., & C.L., §§ 5096, 5097; C.S., §§ 7325, 7326; I.C.A., §§ 9-306, 9-307; am. 1967, ch. 31, § 1, p. 55, were repealed by S.L. 1969, ch. 111, §§ 22 and 23, respectively.

6-308. Parties defendant. — No person other than the tenant of the premises, and subtenant, if there be one, in the actual occupation of the premises when the notice herein provided for was served, need be made parties defendant in the proceeding, nor shall any proceeding abate nor the plaintiff be nonsuited for the nonjoinder of any persons who might have been made parties defendant; but when it appears that any of the parties served with process or appearing in the proceeding are guilty of the offense charged, judgment must be rendered against them. Any person who shall become a subtenant of the premises or any part thereof after the service of notice as provided in this chapter shall be bound by the judgment. In case a married woman be a tenant or a subtenant, her coverture shall constitute no defense; but in case her husband be not joined, or unless she be doing business as a sole trader, an execution issued upon a personal judgment against her can only be enforced against property on the premises at the commencement of the action.

History.
C.C.P. 1881, § 802; R.S., R.C., & C.L., § 5098; C.S., § 7327; I.C.A., § 9-308.

RESEARCH REFERENCES

Am. Jur. — 35A Am. Jur. 2d, Forcible Entry and Detainer, § 16.

C.J.S. — 36A C.J.S., Forcible Entry and Detainer, §§ 27, 28.

6-309. Parties generally. — Except as provided in the preceding section, the provisions of this code relating to parties to civil actions are applicable to this proceeding.

History.
C.C.P. 1881, § 803; R.S., R.C., & C.L., § 5099; C.S., § 7328; I.C.A., § 9-309.

STATUTORY NOTES

Cross References.
Parties in civil actions, Idaho Civil Procedure Rules 14(a), 14(b), 17(a) to 17(d), 19(a)(1) to 21, 25(a)(1).

Compiler's Notes.
The words "this code" in this section refer to the Civil Code which is a division of the Idaho Code, consisting of Titles 1 through 13.

RESEARCH REFERENCES

Am. Jur. — 35A Am. Jur. 2d, Forcible Entry and Detainer, §§ 14, 15.

C.J.S. — 36A C.J.S., Forcible Entry and Detainer, §§ 21 to 26.

6-310. Action for possession — Complaint — Summons. — In an action exclusively for possession of a tract of land of five (5) acres or less for the nonpayment of rent, or on the grounds that a landlord has reasonable grounds to believe that any person is, or has been, engaged in the unlawful delivery, production or use of a controlled substance on the leased premises during the term for which the premises are let to the tenant, or in the event the tenant is a tenant at sufferance pursuant to subsection (11) of section 45-1506, Idaho Code, it is sufficient to state in the complaint:

(1) A description of the premises with convenient certainty;

(2) That the defendant is in possession of the premises;

(3) That the defendant entered upon the premises, holds the premises, and is in default of the payment of rent or that the landlord has reasonable grounds to believe that any person is, or has been, engaged in the unlawful delivery, production or use of a controlled substance on the leased premises during the term for which the premises are let to the tenant;

(4) That all notices required by law have been served upon the defendant in the required manner or no notice is required because the defendant is a tenant at sufferance pursuant to subsection (11) of section 45-1506, Idaho Code; and

(5) That the plaintiff is entitled to the possession of the premises. Upon filing the complaint, a summons must be issued, served and returned as in other actions, provided, however, that at the time of issuance of the summons, the court shall schedule a trial within twelve (12) days from the filing of the complaint and the service of the summons, complaint and trial setting on the defendant shall be not less than five (5) days before the day of trial appointed by the court.

History.

I.C., § 6-310, as added by 1974, ch. 308, § 3, p. 1803; am. 1976, ch. 71, § 1, p. 239; am. 2001, ch. 203, § 2, p. 691; am. 2006, ch. 248, § 1, p. 757.

STATUTORY NOTES

Cross References.

Amendment of complaint, § 6-315.

Complaint must be verified, § 6-318.

Summons in district courts, Idaho Civil Procedure Rules 4(b), 4(e)(1).

Prior Laws.

Former § 6-310, which comprised C.C.P. 1881, § 804; R.S., R.C., & C.L., § 5100; C.S., § 7329; I.C.A., § 9-310 regarding complaints and summons, was repealed by S.L. 1973, ch. 261, § 1, p. 259.

Another former § 6-310, which comprised I.C., § 6-310, as added by 1973, ch. 261, § 2, p. 529 regarding complaint and summons in action for possession, was repealed by S.L. 1974, ch. 308, §§ 1 and 2.

Amendments.

The 2006 amendment, by ch. 248, in the introductory paragraph, inserted "or in the event the tenant is a tenant at sufferance pursuant to subsection (11) of section 45-1506, Idaho Code"; and in subsection (4), added the language beginning "or no notice is required."

Effective Dates.

Section 4 of S.L. 2006, ch. 248 declared an emergency. Approved March 30, 2006.

JUDICIAL DECISIONS

ANALYSIS

Exclusive claim.
Notice.

Exclusive Claim.

Both the unlawful detainer process and the claim and delivery process are statutorily controlled. The claim and delivery statute, § 8-312, provides that, while such actions generally may be given precedence over other pending civil actions insofar as setting the same for hearing or trial, the statutes relating to claim and delivery process do not require, as does the unlawful detainer action (this section), that the action for recovery of personal property be an "exclusive" claim. Powder Basin Psychiatric Assocs. v. Ullrich, 129 Idaho 658, 931 P.2d 652 (Ct. App. 1996).

Notice.

Subdivision 2 of § 6-303 requires that a landlord notify in writing an individual who is behind in his rent before the injured landlord can resort to an action for possession, under this section, or damages, under § 6-311E; however, until written notice is given, the nonpaying tenant is not viewed by the law as unlawfully detaining the rented premises. State v. Johnson, 110 Idaho 516, 716 P.2d 1288 (1986).

RESEARCH REFERENCES

Am. Jur. — 35A Am. Jur. 2d, Forcible Entry and Detainer, §§ 41, 43 to 45.

6-311. Continuance. — In an action exclusively for possession of a tract of land of five (5) acres or less for the nonpayment of rent or if a landlord has alleged that the landlord has reasonable grounds to believe that any person, is or has been, engaged in the unlawful delivery, production, or use of a controlled substance during the term for which the premises are let to the tenant, or if the person is in possession of the property and is a tenant at sufferance pursuant to subsection (11) of section 45-1506, Idaho Code, no continuance shall be granted for a longer period than two (2) days unless the defendant applying therefor gives an undertaking to the adverse party with good and sufficient security, to be approved by the court, conditioned for the payment of the rent that may accrue if judgment is rendered against the defendant.

History.

I.C., § 6-311, as added by 1974, ch. 308, § 4, p. 1803; am. 2001, ch. 203, § 3, p. 691; am. 2006, ch. 248, § 2, p. 757.

STATUTORY NOTES

Prior Laws.

Former § 6-311, which comprised C.C.P. 1881, § 805; R.S., R.C., & C.L., § 5101; C.S., § 7330; I.C.A., § 9-311 regarding the arrest of the defendant, was repealed by S.L. 1971, ch. 119, § 1.

A former § 6-311, which comprised I.C., § 6-311 as added by 1971, ch. 119, § 2, p. 402 regarding writ of restitution and bond, was repealed by S.L. 1973, ch. 261, § 1.

Another former § 6-311, which comprised I.C., § 6-311, as added by 1973, ch. 261, § 3, p. 529 regarding continuances, was repealed by S.L. 1974, ch. 308, §§ 1 and 2.

Amendments.

The 2006 amendment, by ch. 248, inserted "or if the person is in possession of the property and is a tenant at sufferance pursuant to subsection (11) of section 45-1506, Idaho Code" near the middle.

Effective Dates.

Section 4 of S.L. 2006, ch. 248 declared an emergency. Approved March 30, 2006.

6-311A. Judgment on trial by court. — In an action exclusively for possession of a tract of land of five (5) acres or less for the nonpayment of rent or on the grounds that the landlord has reasonable grounds to believe that a person is, or has been, engaged in the unlawful delivery, production, or use of a controlled substance on the leased premises during the term for which the premises are let to the tenant, or if the tenant is a tenant at sufferance pursuant to subsection (11) of section 45-1506, Idaho Code, the action shall be tried by the court without a jury. If, after hearing the evidence the court concludes that the complaint is not true, it shall enter judgment against the plaintiff for costs and disbursements. If the court finds the complaint true or if judgment is rendered by default, it shall render a general judgment against the defendant and in favor of the plaintiff, for restitution of the premises and the costs and disbursements of the action. If the court finds the complaint true in part, it shall render judgment for the restitution of such part only, and the costs and disbursements shall be taxed as the court deems just and equitable. No provision of this law shall be construed to prevent the bringing of an action for damages.

History.

I.C., § 6-311A, as added by 1974, ch. 308, § 5, p. 1803; am. 1996, ch. 169, § 1, p. 553; am. 2001, ch. 203, § 4, p. 691; am. 2006, ch. 248, § 3, p. 757.

STATUTORY NOTES

Prior Laws.

Former § 6-311A, which comprised I.C., § 6-311A, as added by 1971, ch. 119, § 3, p. 402 regarding service of writ of restitution, was repealed by S.L. 1973, ch. 261, § 1, p. 529.

Another former § 6-311A, which comprised I.C., § 6-311A, as added by 1973, ch. 261, § 4, p. 259 regarding judgment on trial by court, was repealed by S.L. 1974, ch. 308, §§ 1 and 2.

Amendments.

The 2006 amendment, by ch. 248, inserted "or if the tenant is a tenant at sufferance pursuant to subsection (11) or section 45-1506, Idaho Code" near the middle.

Effective Dates.

Section 4 of S.L. 2006, ch. 248 declared an emergency. Approved March 30, 2006.

RESEARCH REFERENCES

Am. Jur. — 35A Am. Jur. 2d, Forcible Entry and Detainer, §§ 54, 57.

C.J.S. — 36A C.J.S., Forcible Entry and Detainer, §§ 85, 86, 88 to 91.

6-311B. Verdict and judgment on trial by jury. [Repealed.]

STATUTORY NOTES

Compiler's Notes.

This section, which comprised I.C., § 6-311B, as added by 1974, ch. 308, § 6, p. 1803, was repealed by S.L. 1996, ch. 169, § 2.

6-311C. Form of execution. — The execution, should judgment of restitution be rendered, may be in the following form:

STATE OF IDAHO) ss.
)
County of _____)

TO THE SHERIFF OR ANY CONSTABLE OF THE COUNTY:

WHEREAS, a certain action for the possession of the following described premises, to-wit:

_____

_____

lately tried before the above entitled court, wherein _____ was plaintiff and _____ was defendant, judgment was rendered on the _____ day of _____, A.D., _____, that the plaintiff _____ have restitution of the premises, and also that he recover the costs and disbursements in the sum of $ _____;[.]

In the name of the State of Idaho, you are, therefore, hereby commanded to cause the defendant and his goods and chattels to be forthwith removed from the premises and the plaintiff is to have restitution of the same. In the event the goods and chattels are not promptly removed thereafter by the defendant you are authorized and empowered to cause the same to be removed to a safe place for storage. You are also commanded to levy on the goods and chattels of the defendant, and pay the costs and disbursements, aforesaid, and all accruing costs, and to make legal service and due return of this writ.

WITNESS My hand and official seal (if issued out of a court of record) this ____ day of ____, A.D., ____.

_____

Clerk of the District Court

History.
I.C., § 6-311C, as added by 1974, ch. 308, § 7, p. 1803.

STATUTORY NOTES

Compiler's Notes.
The bracketed insertion, at the end of the first paragraph of the form, was added by the compiler to supply the correct punctuation.

6-311D. Additional undertaking on appeal. — If judgment is rendered against the defendant for the restitution of the real property described in the complaint, or any part thereof, no appeal shall be taken by the defendant from the judgment until he gives, in addition to the undertaking now required by law upon appeal, an undertaking to the adverse party, with two (2) sureties, who shall justify in like manner as bail upon arrest, for the payment to the plaintiff, if the judgment is affirmed on appeal, of the rental value of the real property of which restitution is adjudged from the commencement of the action in which the judgment was rendered until final judgment in the action.

History.
I.C., § 6-311D, as added by 1974, ch. 308, § 8, p. 1803.

6-311E. Action for damages — Complaint — Summons. — In an action for damages incurred as a result of failure to pay rent or damages as

a result of the unlawful production of a controlled substance on the leased premises during the term for which the premises are let to the tenant, the plaintiff in his complaint must set forth the facts on which he seeks to recover. If the plaintiff combines his action for damages with an action for possession, the complaint shall also describe the premises with reasonable certainty and may set forth therein any circumstances which may have accompanied the alleged nonpayment of rent or the facts which are the basis for the landlord's reasonable grounds to believe that a person is, or has been, engaged in the unlawful production of a controlled substance on the leased premises during the term for which the premises are let to the tenant, and claim damages therefor; provided, however, that the early trial provision of section 6-310, Idaho Code, shall not be applicable when an action for damages is combined with an action for possession. In an action for damages, a summons must be issued returnable as in other cases upon filing the complaint.

History.
I.C., § 6-311E, as added by 1974, ch. 308, § 9, p. 1803; am. 2001, ch. 203, § 5, p. 691.

JUDICIAL DECISIONS

Notice.
Subdivision 2 of § 6-303 requires that a landlord notify in writing an individual who is behind in his rent before the injured landlord can resort to an action for possession, under § 6-310, or damages, under this section; however, until written notice is given, the nonpaying tenant is not viewed by the law as unlawfully detaining the rented premises. State v. Johnson, 110 Idaho 516, 716 P.2d 1288 (1986).

RESEARCH REFERENCES

Am. Jur. — 35A Am. Jur. 2d, Forcible Entry and Detainer, § 58.

C.J.S. — 36A C.J.S., Forcible Entry and Detainer, §§ 42 to 62, 74 to 76, 78.

6-312. Judgment by default. — If, at any time appointed, the defendant do [does] not appear and defend, the court must enter his default and render judgment in favor of the plaintiff as prayed for in the complaint.

History.
C.C.P. 1881, § 806; R.S., R.C., & C.L., § 5102; C.S., § 7331; I.C.A., § 9-312.

STATUTORY NOTES

Compiler's Notes.
The bracketed word "does" was inserted by the compiler.

JUDICIAL DECISIONS

Nature of Defense.
This section contemplates a simple defense to charge of forcible or unlawful detainer and does not authorize defendant to seek affirmative relief by cross-complaint or counterclaim for unliquidated damages for a breach of covenant by lessor. Hunter v. Porter, 10 Idaho 72, 77 P. 434 (1904).

Cited in: Cuoio v. Koseris, 68 Idaho 483, 200 P.2d 359 (1948).

RESEARCH REFERENCES

Am. Jur. — 35A Am. Jur. 2d, Forcible Entry and Detainer, § 56.

C.J.S. — 36A C.J.S., Forcible Entry and Detainer, § 87.

6-313. Trial by jury. — Whenever an issue of fact is presented by the pleadings it must be tried by a jury, unless such jury be waived as in other cases. The jury shall be formed in the same manner as other trial juries in the court in which the action is pending.

History.
C.C.P. 1881, § 808; R.S., R.C., & C.L., § 5103; C.S., § 7332; I.C.A., § 9-313.

STATUTORY NOTES

Cross References.
Formation of trial juries, Idaho Civil Procedure Rules 47(a) to 47(m).

Waiver of jury trials, Idaho Civil Procedure Rule 38(d).

RESEARCH REFERENCES

Am. Jur. — 35A Am. Jur. 2d, Forcible Entry and Detainer, § 54.

C.J.S. — 36A C.J.S., Forcible Entry and Detainer, §§ 80, 81.

6-314. Sufficiency of evidence — Defenses. — On the trial of any proceeding for any forcible entry or forcible detainer, the plaintiff shall only be required to show, in addition to the forcible entry or forcible detainer complained of, that he was peaceably in the actual possession at the time of the forcible entry, or was entitled to the possession at the time of the forcible detainer. The defendant may show in his defense that he or his ancestors, or those whose interest in such premises he claims, have been in the quiet possession thereof for the space of one whole year together next before the commencement of the proceedings, and that his interest therein is not then ended or determined; and such showing is a bar to the proceedings.

History.
C.C.P. 1881, § 809; R.S., R.C., & C.L., § 5104; C.S., § 7333; I.C.A., § 9-314.

JUDICIAL DECISIONS

ANALYSIS

Appeals.
Bar to recovery.
Burden of proof.
Counterclaim or cross-complaint.
Res judicata.

Appeals.
Where fact that another action involving title of the property was pending did not appear upon the face of the complaint, nor did the demurrer present such issue and neither did the answer, an assignment of error in that

regard may not be considered. Snyder v. Blake, 69 Idaho 14, 202 P.2d 394 (1949).

Bar to Recovery.

An action for unlawful entry, based upon the placement of a fence upon the plaintiff's land, is barred under the forcible detainer statute, if the fence has been in place for more than one year. Loomis v. Union P.R.R., 97 Idaho 341, 544 P.2d 299 (1975).

Burden of Proof.

If plaintiff relies upon title as providing his right of possession, the burden of proof is upon him to show title; and it may be traversed by defendant; i.e., defendant may interpose plea that he is not a tenant and never was; that plaintiff is not his landlord and that, instead of being a tenant, defendant actually owns the property. Snyder v. Blake, 69 Idaho 14, 202 P.2d 394 (1949).

Counterclaim or Cross-Complaint.

Proceedings under this chapter are not subject to counterclaim or cross-complaint as ordinary actions. Hunter v. Porter, 10 Idaho 72, 77 P. 434 (1904).

Res Judicata.

One who establishes his title makes a case entitling him to possession, however, such determination is binding only in an immediate case and as to the right of possession. Snyder v. Blake, 69 Idaho 14, 202 P.2d 394 (1949).

Cited in: Fry v. Weyen, 58 Idaho 181, 70 P.2d 359 (1937).

RESEARCH REFERENCES

Am. Jur. — 35A Am. Jur. 2d, Forcible Entry and Detainer, §§ 46 to 50, 52, 53.

C.J.S. — 36A C.J.S., Forcible Entry and Detainer, §§ 32 to 34, 65 to 73.

6-315. Amendment of complaint. — When, upon the trial of any proceeding under this chapter, it appears from the evidence that the defendant has been guilty of either a forcible entry or a forcible or unlawful detainer, and other than the offense charged in the complaint, the judge must order that such complaint be forthwith amended to conform to such proofs. Such amendment must be without any imposition of terms. No continuance shall be permitted upon account of such amendment unless the defendant, by affidavit filed, shows to the satisfaction of the court good cause therefor.

History.

C.C.P. 1881, § 810; R.S., R.C., & C.L., § 5105; C.S., § 7334; I.C.A., § 9-315.

6-316. Judgment — Restitution. — If, upon the trial, the verdict of the jury, or, if the case be tried without a jury, the finding of the court, be in favor of the plaintiff and against the defendant, judgment shall be entered for the restitution of the premises; and if the proceeding be for an unlawful detainer after neglect or failure to perform the conditions or covenants of the lease or agreement under which the property is held, or after default in the payment of rent or based upon a finding that a landlord had reasonable grounds to believe that a person is, or has been, engaged in the unlawful distribution, production, or use of a controlled substance on the leased premises during the term for which the premises are let to the tenant, the judgment shall also declare the forfeiture of such lease or agreement. The jury, or the court, if the proceeding be tried without a jury, shall also assess the damages occasioned to the plaintiff by any forcible entry, or by any forcible or unlawful detainer, alleged in the complaint and proved on the trial, and find the amount of any rent due, if the alleged unlawful detainer be after default in the payment of rent or, after default, based upon a finding

that a landlord had reasonable grounds to believe that a person is, or has been, engaged in the unlawful distribution, production, or use of a controlled substance on the leased premises during the term for which the premises are let to the tenant, and the judgment shall be rendered against the defendant guilty of the forcible entry, or forcible or unlawful detainer, for the amount of the damages thus assessed, and of the rent found due. When the proceeding is for an unlawful detainer after default in payment of rent where the tract of land is larger than five (5) acres, and the lease or agreement under which the rent is payable has not by its terms expired, execution upon the judgment shall not be issued until the expiration of five (5) days after the entry of the judgment, within which time the tenant, or any subtenant, or any mortgagee of the term, or other party interested in its continuance, may pay into court, for the landlord, the amount found due as rent, with interest thereon, and the amount of the damages found by the jury or the court for the unlawful detainer, and the costs of the proceeding, and thereupon the judgment shall be satisfied and the tenant be restored to his estate; but if payment as here provided be not made within the five (5) days, the judgment may be enforced for its full amount, and for the possession of the premises. In all other cases the judgment may be enforced immediately.

History.
C.C.P. 1881, § 811; R.S., R.C., & C.L., § 5106; C.S., § 7335; I.C.A., § 9-316; am. 1974, ch. 308, § 10, p. 1803; am. 1977, ch. 45, § 1, p. 80; am. 2001, ch. 203, § 6, p. 691.

STATUTORY NOTES

Effective Dates.
Section 11 of S.L. 1974, ch. 308 declared an emergency. Approved April 5, 1974.

JUDICIAL DECISIONS

Analysis

Abandonment.
Construction.
Effect of action on lease.
Recovery of landlord.
Remedies.
Rent deposits.
Rent not alleged.
Treble damages.
Unlawful detention.

Abandonment.
Seizure of personal property by sheriff and locking of premises did not constitute an abandonment, surrender, or termination of lease. Brooks v. Coppedge, 71 Idaho 166, 228 P.2d 248 (1951).

Construction.
Provisions of this section are penal in nature and must be strictly construed. Knight v. Fox Caldwell Theatres Corp., 70 Idaho 148, 212 P.2d 1027 (1949).

Effect of Action on Lease.
The service of notice and commencement of action for failure to pay rent when due does not primarily terminate or forfeit the lease; but a payment for the rent together with interest, damages found, and costs, at any time within five days after judgment, keeps the lease alive and saves it from forfeiture.

Hunter v. Porter, 10 Idaho 72, 77 P. 434 (1904).

Recovery of Landlord.

In event of breach of lease through failure to pay rent, landlord is entitled to (1) judgment for restitution, (2) judgment for rent due and unpaid, and (3) judgment for any damages alleged and proven in addition to rent found due. Brooks v. Coppedge, 71 Idaho 166, 228 P.2d 248 (1951).

Remedies.

Fact that lease was to expire in two years if plaintiff failed to sub-lease to defendants, shows that extension agreement between landlord and plaintiff for five years was made expressly for defendant's benefit, and that possession by defendant during the remaining months of the extended term precludes plaintiff from resorting to remedy prescribed by this section. Knight v. Fox Caldwell Theatres Corp., 70 Idaho 148, 212 P.2d 1027 (1949).

A lessor's contractual right to forfeiture must be clearly stipulated in order to be enforceable but, even absent a contractual forfeiture remedy, the statutory remedy is still available in an unlawful detainer action; absent a clear contractual right to declare forfeiture, a landlord may not, without the express consent of a tenant, repossess his property without resorting to remedies provided in the unlawful detainer statutes. Riverside Dev. Co. v. Ritchie, 103 Idaho 515, 650 P.2d 657 (1982).

Where a lease agreement contained a very definitive contractual right to terminate the lease upon default of the lessee, the lessor had a choice of pursuing either its contractual or statutory remedy. Riverside Dev. Co. v. Ritchie, 103 Idaho 515, 650 P.2d 657 (1982).

Rent Deposits.

It was error for court to order payment of rent due out of deposit covering last six months of lease, where only provisions as to return of deposit was in event of exercise of option or in event of fire. Brooks v. Coppedge, 71 Idaho 166, 228 P.2d 248 (1951).

Rent Not Alleged.

Where no rent was alleged or proved, the court could not find that respondent was in default in the payment of rent, or, as a tenant, obligated to give over possession of the property or any amount due. Richardson v. King, 51 Idaho 762, 10 P.2d 323 (1932).

Treble Damages.

Fact that judgment might be entered for treble damages does not change rule that notice of motion for new trial must be given within ten (10) days after verdict. Hess v. Swanson, 36 Idaho 135, 209 P. 721 (1922).

Only in those cases where tortious act was committed maliciously or wantonly is court warranted in inflicting treble damages. Read v. La Shonse, 45 Idaho 299, 261 P. 773 (1927).

Trial court's finding that tenant stayed in possession for 18 days after expiration of the lease, without consent, express or implied, was insufficient to justify award of treble damages; and, on remand, trial court will find whether the intent or motives of tenant disclosed malice, wantonness or oppression during time they held over, then enter conclusions of law and judgment to conform to such findings. Pearson v. Harper, 87 Idaho 245, 392 P.2d 687 (1964).

Absent a showing of malice, wantonness, or oppression, treble damages cannot properly be awarded in an action for unlawful detainer. Pearson v. Harper, 87 Idaho 245, 392 P.2d 687 (1964); Mecham v. Nelson, 92 Idaho 783, 451 P.2d 529 (1969).

Unlawful Detention.

In an unlawful detainer action brought by a gas company to regain possession of a bulk plant from the bulk plant operator, the company was restored to possession of the plant and awarded the reasonable rental value of the property for the period of unlawful detention but was denied damages, since expenses the company incurred in establishing a temporary bulk plant did not naturally flow from the operator's unlawful detainer. Texaco, Inc. v. Johnson, 96 Idaho 935, 539 P.2d 288 (1975).

Cited in: Messinger v. Cox, 33 Idaho 363, 194 P. 473 (1920); Swanson v. Olsen, 38 Idaho 24, 220 P. 407 (1923); Cuoio v. Koseris, 68 Idaho 483, 200 P. 359 (1948); Enders v. Wesley W. Hubbard & Sons, 95 Idaho 590, 513 P.2d 992 (1973); Olson v. Bedke, 97 Idaho 825, 555 P.2d 156 (1976).

RESEARCH REFERENCES

Am. Jur. — 35A Am. Jur. 2d, Forcible Entry and Detainer, §§ 55, 57, 61, 62.

C.J.S. — 36A C.J.S., Forcible Entry and Detainer, §§ 85, 86, 88 to 91.

6-317. Treble damages. — If a landlord or a tenant recovers damages for a forcible or unlawful entry in or upon, or detention of, any building or other tract of land, or for an action brought pursuant to section 6-320, Idaho

Code, judgment may be entered for three (3) times the amount at which the actual damages are assessed.

History.
C.C.P. 1881, § 475; R.S., R.C., & C.L., § 4533; C.S., § 6960; I.C.A., § 9-317; am. 1977, ch. 45, § 2, p. 80.

STATUTORY NOTES

Cross References.
Damages for entry for surveying purposes, § 54-1231.
Entry for surveying purposes, § 54-1230.

JUDICIAL DECISIONS

Analysis

Application.
Construction.
Counter or cross-claim.
Entry under color of right.
Treble damages.

Application.
Absent a showing of malice, wantonness, or oppression, treble damages can not properly be awarded in an action for unlawful detainer. Pearson v. Harper, 87 Idaho 245, 392 P.2d 687 (1964).

Construction.
Provisions of this section are penal in nature and must be strictly construed. Knight v. Fox Caldwell Theatres Corp., 70 Idaho 148, 212 P.2d 1027 (1950).

Counter or Cross-claim.
Since a counter cross-claim was improper in an unlawful detainer action filed by a gas company against a bulk distributor operator to recover possession of a bulk plant, dismissal of the operator's counterclaim alleging that gas company's action in terminating distributor and consignment agreements interfered with operator's right to freely sell his business, rather than severance for separate trial as operator requested, was proper. Texaco, Inc. v. Johnson, 96 Idaho 935, 539 P.2d 288 (1975).

Entry Under Color of Right.
Where vendors peaceably entered upon premises under what they believed was a correct interpretation of the contract in question, purchaser was not entitled to have as damages treble the amount found due as rent. Read v. La Shonse, 45 Idaho 299, 261 P. 773 (1927).

Treble Damages.
Trial court's finding that tenant stayed in possession for 18 days after expiration of the lease, without consent, express or implied, was insufficient to justify award of treble damages; on remand, trial court will find whether the intent or motives of tenant disclosed malice, wantonness or oppression during time they held over and enter conclusions of law and judgment to conform to such findings. Pearson v. Harper, 87 Idaho 245, 392 P.2d 687 (1964).

Cited in: Cuoio v. Koseris, 68 Idaho 483, 200 P.2d 359 (1948); Fleming v. Hathaway, 107 Idaho 157, 686 P.2d 837 (Ct. App. 1984).

RESEARCH REFERENCES

Am. Jur. — 35A Am. Jur. 2d, Forcible Entry and Detainer, § 59.

C.J.S. — 36A C.J.S., Forcible Entry and Detainer, §§ 74 to 78.

6-318. Pleadings must be verified. — The complaint and answer must be verified.

History.
C.C.P. 1881, § 812; R.S., R.C., & C.L., § 5107; C.S., § 7336; I.C.A., § 9-318.

6-319. Appeal as stay. — An appeal taken by the defendant does not stay proceedings upon the judgment unless the court so directs.

History.
C.C.P. 1881, § 813; R.S., R.C., & C.L., § 5108; C.S., § 7337; I.C.A., § 9-319.

RESEARCH REFERENCES

Am. Jur. — 35A Am. Jur. 2d, Forcible Entry and Detainer, §§ 63, 66, 67.

C.J.S. — 36A C.J.S., Forcible Entry and Detainer, §§ 92 to 111.

6-320. Action for damages and specific performance by tenant. — (a) A tenant may file an action against a landlord for damages and specific performance for:

(1) Failure to provide reasonable waterproofing and weather protection of the premises;

(2) Failure to maintain in good working order electrical, plumbing, heating, ventilating, cooling, or sanitary facilities supplied by the landlord;

(3) Maintaining the premises in a manner hazardous to the health or safety of the tenant;

(4) Failure to return a security deposit as and when required by law;

(5) Breach of any term or provision of the lease or rental agreement materially affecting the health and safety of the tenant, whether explicitly or implicitly a part thereof; and

(6) Failure to install approved smoke detectors in each dwelling unit, to include mobile homes, under the landlord's control. Upon commencement of a rental agreement, the landlord shall verify that smoke detectors have been installed and are in good working order in the dwelling unit. The tenant shall maintain the smoke detectors in good working order during the tenant's rental period. For purposes of this section, an approved smoke detector is a battery-operated device that is capable of detecting visible or invisible particles of combustion and that bears a label or other identification issued by an approved testing agency having a service for inspection of materials and workmanship at the factory during fabrication and assembly. If the landlord or the landlord's assignee fails to install working smoke detectors, the tenant may send written notice by certified mail, return receipt requested, to the landlord or the landlord's assignee that if working smoke detectors are not installed within seventy-two (72) hours of receipt of the letter, the tenant may install smoke detectors and deduct the cost from the tenant's next month's rent. Smoke detectors purchased by the tenant and deducted from rent become the property of the landlord and shall not be removed from the premises.

Upon filing the complaint, a summons must be issued, served and returned as in other actions, provided, however, that in an action exclusively for specific performance, at the time of issuance of the summons, the court shall schedule a trial within twelve (12) days from the filing of the complaint, and the service of the summons, complaint and trial setting on the defendant shall be not less than five (5) days before the day of trial

appointed by the court. If the plaintiff brings an action for damages under this section, or combines his action for damages with an action for specific performance, the early trial provision of this section shall not be applicable, and a summons must be issued returnable as in other cases upon filing the complaint.

(b) In an action under this section, plaintiff, in his complaint, must set forth the facts on which he seeks to recover, describe the premises, and set forth any circumstances which may have accompanied the failure or breach by the landlord.

(c) If, upon the trial, the verdict of the jury, or, if the case be tried without a jury, the finding of the court, be in favor of the plaintiff against the defendant, judgment shall be entered for the amount of the damages assessed. Judgment may also be entered requiring specific performance for any breach of agreement showing by the evidence, and for costs and disbursements.

(d) Before a tenant shall have standing to file an action under this section, he must give his landlord three (3) days written notice, listing each failure or breach upon which his action will be premised and written demand requiring performance or cure. If, within three (3) days after service of the notice, any listed failure or breach has not been performed or cured by the landlord, the tenant may proceed to commence an action for damages and specific performance.

(e) The provisions of this section shall not apply to tracts of land of five (5) acres or more used for agricultural purposes.

History.

I.C., § 6-320, as added by 1977, ch. 45, § 4, p. 80; am. 1994, ch. 418, § 1, p. 1308.

STATUTORY NOTES

Prior Laws.

Former § 6-320, which comprised C.C.P. 1881, § 814; R.S., R.C., & C.L., § 5109; C.S., § 7338; I.C.A., § 9-320, was repealed by S.L. 1977, ch. 45, § 3.

Compiler's Notes.

As enacted the heading of this section read: "Action for damages — Specific performance — Tenant."

JUDICIAL DECISIONS

Analysis

Forfeiture of security deposit.
Implied warranty of habitability.
In general.
Physical possession not required.
Retaliatory eviction.
Return of security deposit.
Tenant's counterclaim.

Forfeiture of Security Deposit.

The record supported the magistrate's conclusion that the lease was sufficiently clear and unambiguous and that the lessors were entitled to retain the $100 security deposit under a valid and enforceable forfeiture agreement. As a result, the lessee's right to a refund under § 6-321 and this section was subject to be offset by the sum to be forfeited as compensation for the lessors' damages. Fleming v. Hathaway, 107 Idaho 157, 686 P.2d 837 (Ct. App. 1984).

Implied Warranty of Habitability.

In adopting the reasonable care standard for landlords in *Stephens v. Stearns*, 106 Idaho 249, 678 P.2d 41 (1984), the Idaho supreme court noted that its holding was supported by a statutory version of the implied warranty of habitability. Stevens v. Fleming, 116 Idaho 523, 777 P.2d 1196 (1989).

Court erred in instructing jury that; under implied warranty of habitability statute, the jury needed to find that the landlord was negligent in order for the tenant to collect damages for a noxious odor caused by maintenance of the building. Silver Creek Computers, Inc. v. Petra, Inc., 136 Idaho 879, 42 P.3d 672 (2002).

In General.

The supreme court would not expand the common law by imposing an implied obligation on the part of a landlord to keep the premises in a habitable state of repair, where the legislature had already acted in the same area by enacting this statutory version of the implied warranty of habitability theory. Worden v. Ordway, 105 Idaho 719, 672 P.2d 1049 (1983).

Physical Possession Not Required.

Where a landlord wrongfully locks a tenant out of the premises, a tenant would be entitled to bring an action under subdivision (a)(5) of this section for breach of the covenant of quiet enjoyment, after first giving the three days' notice required by subsection (d) of this section, even though the tenant would have lost actual physical possession of the premises; accordingly, a tenant's right to sue under this section is not invariably precluded because at the time the three days' notice was given, the tenant was no longer in physical possession. Worden v. Ordway, 105 Idaho 719, 672 P.2d 1049 (1983).

Retaliatory Eviction.

Retaliatory eviction is an affirmative defense available to tenants. A landlord's request for eviction of a tenant under §§ 6-301 through 6-316 may be defeated by a showing that the primary motive for the eviction is retaliation against the tenant for reporting violations of housing or safety codes to authorities and seeking specific performance of repairs under this section. The tenant will carry the burden to prove the retaliatory nature of the eviction. Wright v. Brady, 126 Idaho 671, 889 P.2d 105 (Ct. App. 1995).

Return of Security Deposit.

The claim of a tenant to a refund of a security deposit may be subject to an offset for damages allowed to the landlord. Indeed, such a counterclaim — if it arose from the same transaction, i.e., the tenancy agreement, which forms the basis for a dispute over the security deposit — would be a compulsory one which could not be raised in a separate, independent action. Fleming v. Hathaway, 107 Idaho 157, 686 P.2d 837 (Ct. App. 1984).

Tenant's Counterclaim.

Subsection (d) of this section, which requires a tenant to give specific written notice to the landlord, does not apply to a tenant's counterclaim in an action by the landlord seeking recovery for unpaid rent and other losses. Young v. Scott, 108 Idaho 506, 700 P.2d 128 (Ct. App. 1985).

District court erred by reinstating tenants' third-party complaint against landlord, ruling that it was a counterclaim, because tenants failed to provide three-day notice, which was required regardless of the form in which the claim was brought. Action Collection Serv. v. Haught, 146 Idaho 300, 193 P.3d 460 (Ct. App. 2008).

Cited in: Stephens v. Stearns, 106 Idaho 249, 678 P.2d 41 (1984).

DECISIONS UNDER PRIOR LAW

Counterclaim or Cross-complaint.

Proceedings under this chapter are not subject to counterclaim or cross-complaint. Hunter v. Porter, 10 Idaho 72, 10 Idaho 86, 77 P. 434 (1904).

6-321. Security deposits. — Amounts deposited by a tenant with a landlord for any purpose other than the payment of rent shall be deemed security deposits. Upon termination of a lease or rental agreement and surrender of the premises by the tenant all amounts held by the landlord as a security deposit shall be refunded to the tenant, except amounts necessary to cover the contingencies specified in the deposit arrangement. The landlord shall not retain any part of a security deposit to cover normal wear and tear. "Normal wear and tear" means that deterioration which occurs based upon the use for which the rental unit is intended and without

negligence, carelessness, accident, or misuse or abuse of the premises or contents by the tenant or members of his household, or their invitees or guests.

Refunds shall be made within twenty-one (21) days if no time is fixed by agreement, and in any event, within thirty (30) days after surrender of the premises by the tenant. Any refunds in an amount less than the full amount deposited by the tenant shall be accompanied by a signed statement itemizing the amounts lawfully retained by the landlord, the purpose for the amounts retained, and a detailed list of expenditures made from the deposit.

If security deposits have been made as to a particular rental or lease property, and the property changes ownership during a tenancy, the new owner shall be liable for refund of the deposits.

History.
I.C., § 6-321, as added by 1977, ch. 45, § 5, p. 80.

JUDICIAL DECISIONS

ANALYSIS

Forfeiture.
Signed statement from landlord.

Forfeiture.
The record supported the magistrate's conclusion that the lease was sufficiently clear and unambiguous and that the lessors were entitled to retain the $100 security deposit under a valid and enforceable forfeiture agreement. As a result, the lessee's right to a refund under § 6-320 and this section was subject to be offset by the sum to be forfeited as compensation for the lessors' damages. Fleming v. Hathaway, 107 Idaho 157, 686 P.2d 837 (Ct. App. 1984).

Signed Statement from Landlord.
This section plainly requires that, in the event less than the full amount of a deposit is returned, the landlord must provide the tenant with a "signed statement" itemizing the expenditures made by the landlord and the purpose of those expenditures; the lease agreement, by itself, does not suffice. Accordingly, the magistrate erred in his conclusion that providing oral notice of a forfeiture and a signed copy of the lease constituted compliance with this section. Fleming v. Hathaway, 107 Idaho 157, 686 P.2d 837 (Ct. App. 1984).

6-322. Rules of practice in general. — The provisions of this code relative to civil actions, appeals and new trials, so far as they are not inconsistent with the provisions of this chapter, apply to the proceedings mentioned in this chapter.

History.
I.C., § 6-322, as added by 1977, ch. 45, § 6, p. 80.

STATUTORY NOTES

Cross References.
Appeals to Supreme Court, see Idaho Appellate Rules.
Rules in civil actions, see Idaho Rules of Civil Procedure.

Compiler's Notes.
The words "this code" refer to the Code of Civil Procedure, which is a division of the Idaho Code, consisting of Titles 1 through 13.

RESEARCH REFERENCES

Am. Jur. — 35A Am. Jur. 2d, Forcible Entry and Detainer, § 38.

C.J.S. — 36A C.J.S., Forcible Entry and Detainer, §§ 40, 80 to 84.

6-323. Service of notice to landlord. — The notice required by section 6-320(d), Idaho Code, shall be served either:

(1) By delivering a copy to the landlord or his agent personally; or

(2) If the landlord or his agent is absent from his usual place of business, by leaving a copy with an employee at the usual place of business of the landlord or his agent; or

(3) By sending a copy of the notice to the landlord or his agent by United States Postal Service certified mail, return receipt requested.

History.
I.C., § 6-323, as added by 1977, ch. 45, § 7, p. 80.

JUDICIAL DECISIONS

Cited in: Howerton v. Gabica, 708 F.2d 380 (9th Cir. 1983).

6-324. Attorney fees. — In any action brought under the provisions of this chapter, except in those cases where treble damages are awarded, the prevailing party shall be entitled to an award of attorney fees. For attorney fees to be awarded in cases requiring the three (3) days' notice as set forth in section 6-303 2., Idaho Code, it shall be necessary that the three (3) days' notice advise the tenant that attorney fees shall be awarded to the prevailing party.

History.
I.C., § 6-324, as added by 1985, ch. 144, § 1, p. 388.

JUDICIAL DECISIONS

ANALYSIS

Third-party complaint.
Unlawful detainer.

Third-party Complaint.

As prevailing party, landlord was entitled to attorney fees on appeal of tenants' third-party complaint. Action Collection Serv. v. Haught, 146 Idaho 300, 193 P.3d 460 (Ct. App. 2008).

Unlawful Detainer.

Where finding, that tenant was guilty of unlawful detainer of property under § 6-303, was supported by substantial, competent evidence, the attorney fee award to the landowners under this section was proper. Hettinga v. Sybrandy, 126 Idaho 467, 886 P.2d 772 (1994).

Proper notice was given in the unlawful detainer action and, as the beneficiaries were the prevailing parties, attorney fees and costs were awarded to them. Carter v. Zollinger, 146 Idaho 842, 203 P.3d 1241 (2009).

Cited in: Farm Credit Bank v. Wissel, 122 Idaho 565, 836 P.2d 511 (1992).

CHAPTER 4

QUIETING TITLE — OTHER PROVISIONS RELATING TO ACTIONS CONCERNING REAL ESTATE

6-401. Actions to quiet title. — An action may be brought by any person against another who claims an estate or interest in real or personal property adverse to him, for the purpose of determining such adverse claim, provided that all actions to adjudicate water rights and obtain a decree as to water source, quantity, point of diversion, place of use, nature of use, period of use, and priority as against other water users shall be brought under the provisions of chapter 14, title 42, Idaho Code.

History.

C.C.P. 1881, § 476; R.S., R.C., & C.L., § 4538; C.S., § 6961; I.C.A., § 9-401; am. 1937, ch. 22, § 1, p. 32; am. 1981, ch. 265, § 1, p. 561.

STATUTORY NOTES

Cross References.

Actions to correct defective acknowledgments, § 55-725.

Actions to determine adverse claims to lots under the townsite act, § 58-811 et seq.

Actions to prove instruments for record, § 55-726.

Actions to recover property granted with right of reentry, § 55-212.

Joinder with mortgage foreclosure, §§ 45-1302, 45-1303.

Judgments affecting land to be recorded with deed records, § 31-2407.

Lis pendens, § 5-505.

Reentry of dispossessed person on real property a contempt, § 7-602.

Unknown owners or heirs as parties, § 5-326.

Venue of actions, § 5-401.

Effective Dates.

Section 4 of S.L. 1981, ch. 265 declared an emergency. Approved April 4, 1981.

JUDICIAL DECISIONS

ANALYSIS

Adverse parties.
Claim preclusion.
Form of action.
Fraudulent transfer.
In general.

Judgment.
Jurisdiction.
Jury trial.
Pleading.
Property subject to action.
Recitals of tax deed.
Right to maintain action.
Tax title superior to bondholder's rights.
Venue.
Water rights.

Adverse Parties.

There must be adverse parties to an action or proceeding, whether it be prosecuted under the statute to quiet title or under the declaratory judgment act (see § 10-1201 et seq.). Whitney v. Randall, 58 Idaho 49, 70 P.2d 384 (1937).

Claim Preclusion.

Where plaintiffs lost suit to quiet title to land on basis of adverse possession, second action by same plaintiffs to quiet title on theory of accretion was barred by claim preclusion, since theory of accretion grew out of same operative facts as theory of adverse possession and could have been raised in first action. Aldape v. Akins, 105 Idaho 254, 668 P.2d 130 (Ct. App. 1983).

Form of Action.

This section has not prescribed any particular form of action for determining adverse claims to mining locations under the statutes of the United States and does not preclude action in nature of ejectment at law with consequent right to the jury trial in such case. Burke v. McDonald, 2 Idaho 339, 13 P. 351 (1887).

This section does not do away with action of ejectment, or preclude person bringing such action from alleging and proving facts required therein. McMasters v. Torsen, 5 Idaho 536, 51 P. 100 (1897).

Where suit is brought in federal court praying for cancellation of deeds to interests in mining claim, for decree determining adverse claims of defendants to such interests and establishing complainant's title thereto, and a receiver is prayed for to take control, and an injunction restraining defendants from taking ore therefrom pending suit, the court has jurisdiction to determine entire controversy between parties respecting the mine and ore, and it is the duty of defendants to set up all defenses they may have to complainants' claim. Hanley v. Beatty, 117 F. 59 (9th Cir. 1902).

Action by party actually in possession of property to quiet title to the leasehold estate is suit in equity and neither party is entitled to jury as matter of right. Shields v. Johnson, 10 Idaho 476, 79 P. 391 (1904).

Action under this section may be equitable or legal depending upon the facts. Stockton v. Oregon Short Line R.R., 170 F. 627 (C.C.D. Idaho 1909).

Fraudulent Transfer.

One who purchased property at an execution or tax sale received legal title and could bring an action to remove a cloud on the title created by a fraudulent transfer. Therefore, the district court had the equitable power to clear tax sale purchaser's title by setting aside the tax debtors' deeds to the family trust, which deeds were void and unenforceable against the tax sale purchaser. Haney v. Molko, 123 Idaho 132, 844 P.2d 1382 (Ct. App. 1992).

In General.

Although a quiet title action challenges the title of an adversary, the plaintiff necessarily asserts his own estate in bringing a quiet title action; thus, a party seeking to quiet title against another must succeed on the strength of his own title and may not rely merely upon the weakness of his adversary. Aldape v. Akins, 105 Idaho 254, 668 P.2d 130 (Ct. App. 1983).

Judgment.

In a proper case, the trial court will render and enter judgment enjoining assertion of any right, title, or interest of, in or to the property in dispute, adverse to petitioners. Stewart Mining Co. v. Ontario Mining Co., 23 Idaho 724, 132 P. 787 (1913), aff'd, 237 U.S. 350, 35 S. Ct. 610, 59 L. Ed. 989 (1914).

Jurisdiction.

District court has jurisdiction to hear and determine action to quiet title though the suit involves mental competency of one of the parties to a contract made. Whitney v. Randall, 58 Idaho 49, 70 P.2d 384 (1937).

A decree in a suit to quiet title is subject to collateral attack only on grounds of lack of jurisdiction of parties or of subject-matter. Bruun v. Hanson, 103 F.2d 685 (9th Cir.), cert. denied, 308 U.S. 571, 60 S. Ct. 86, 84 L. Ed. 479 (1939).

The district court had subject matter jurisdiction over suit to quiet title and to recover possession of real property located in Idaho purchased by plaintiffs at tax sale. Gage v. Harris, 119 Idaho 451, 807 P.2d 1289 (Ct. App. 1991).

Where defendant who was a resident of Kootenai County did not challenge the adequacy of service of process personally served in Kootenai County, the district court acquired personal jurisdiction over him in suit to quiet title and recover possession of real property located in Idaho. Gage v. Harris, 119 Idaho 451, 807 P.2d 1289 (Ct. App. 1991).

Jury Trial.

Under this section, an action to determine adverse claims to real or personal property, to quiet title thereto, is in equity and the parties are not entitled to a jury as a matter of right; it is within the discretion of the trial court as to whether it will submit any question of fact to the jury for their finding. Shields v. Johnson, 10 Idaho 476, 79 P. 391 (1904); Fairview Inv. Co. v. Lamberson, 25 Idaho 72, 136 P. 606 (1913).

In an action for quiet title to real property, there is no right to a jury trial. Loomis v. Union P.R.R., 97 Idaho 341, 544 P.2d 299 (1975).

Pleading.

Complaint which shows that plaintiff has an interest or right to possession of land and that defendant, without right, claims an interest or estate in said land adverse to plaintiff is sufficient without setting out what interest defendant claims. Fry v. Summers, 4 Idaho 424, 39 P. 1118 (1895).

In action to quiet title where defendant relies upon title in himself, a cross-complaint is not necessary; where defendant seeks to enforce equitable title against plaintiff as holder of the legal title, a cross-complaint is proper. Bacon v. Rice, 14 Idaho 107, 93 P. 511 (1908).

In an action to quiet title, an allegation in ordinary and concise terms of the ultimate fact that plaintiff was the owner of the property was sufficient without setting out probative facts with which to thus establish that ultimate fact. Hammitt v. Virginia Mining Co., 32 Idaho 245, 181 P. 336 (1919); Ihly v. John Deere Plow Co., 35 Idaho 651, 208 P. 838 (1922).

A cross-complaint which described a mining claim as located on the Red Rock Lode mining claims in the Mineral Hill Mining District, Blaine County, Idaho, and recited that the claim was duly located and recorded with the County Recorder of Blaine County on Nov. 18, 1931, "reference to the records of which are hereby made for a more detailed description of said mining claim," was not a sufficient description to give trial court jurisdiction to enter a decree quieting title to the mining claim in the cross-complaint. Norrie v. Fleming, 62 Idaho 381, 112 P.2d 482 (1941).

Complaint to quiet title which alleged in ordinary and concise language the necessary ultimate facts of ownership, possession, payment of taxes and adverse claim was sufficient to withstand a demurrer. Edgeller v. Johnston, 74 Idaho 359, 262 P.2d 1006 (1953).

Because a claim of title is a general claim of ownership of the property, a complaint to quiet title is sufficient if it alleges, in ordinary and concise terms, that the plaintiff is the owner of the disputed property, without setting forth the probative facts by which that ultimate fact is to be established. Aldape v. Akins, 105 Idaho 254, 668 P.2d 130 (Ct. App. 1983).

The plaintiff in a quiet title action does not merely claim title by a specific theory, or assert that there is a specific defect in the adversary's title; rather, the plaintiff claims ownership, and he claims it upon any legal theory or set of probative facts which may be employed to establish such ownership. Aldape v. Akins, 105 Idaho 254, 668 P.2d 130 (Ct. App. 1983).

Property Subject to Action.

This section applies to public lands claimed adversely by individual subject only to paramount title of United States. Crandall v. Gross, 30 Idaho 661, 167 P. 1025 (1917).

Action to ascertain and decree extent and priority of right to use of water partakes of nature of action to quiet title to real estate. Mays v. District Court, 34 Idaho 200, 200 P. 115 (1921).

A houseboat which was not nor was it ever intended to be permanently affixed or appurtenant to the land, either actually or constructively, constituted personalty belonging to appellants and the judgment quieting title to the houseboat which referred to in the judgment as the structure situate on the described lands in the land owners would be reversed. Prudente v. Nechanicky, 84 Idaho 42, 367 P.2d 568 (1961).

Every estate or interest known to the law in real property, whether legal or equitable, may be determined in an action to quiet title. Lewiston Lime Co. v. Barney, 87 Idaho 462, 394 P.2d 323 (1964).

Recitals of Tax Deed.

Deed to land sold for taxes reciting compliance with law in making sale is sufficient to cast burden on defendant to show that law was violated in that notice was not published as required. Shail v. Croxford, 54 Idaho 408, 32 P.2d 777 (1934).

Right to Maintain Action.

Where judgment is recovered against husband and execution is levied on separate property of wife, the wife may bring action under this section to enjoin sale and for vacation of writ of execution as to such property. Young v. First Nat'l Bank, 4 Idaho 323, 39 P. 557 (1895).

One who enters upon land and improves,

cultivates, and exercises complete control for period of seventeen (17) years without his title ever being questioned may maintain an action to quiet title under this section, although patent under which he claims vests no title to land in controversy. Johnson v. Hurst, 10 Idaho 308, 77 P. 784 (1904), overruled on other grounds, Callahan v. Price, 26 Idaho 755, 146 P. 732 (1915).

Anyone claiming some right or interest in land may maintain a suit to quiet his title under this section, although he has neither possession nor legal title to such land; thus holder of the equitable title may maintain a suit against holder of the legal title. Coleman v. Jaggers, 12 Idaho 125, 85 P. 894 (1906); Western Loan & Bldg. Co. v. Bandel, 57 Idaho 101, 63 P.2d 159 (1936).

Action may be maintained by remainderman for protection of contingent remainder as against one who claims an estate or interest in property adverse to such remainderman. Wilson v. Linder, 18 Idaho 438, 110 P. 274 (1910).

Provisions of this section are broad and any person, whether in possession or not, whether holding legal or equitable title, may bring action. The Mode, Ltd. v. Myers, 30 Idaho 159, 164 P. 91 (1917); Western Loan & Bldg. Co. v. Bandel, 57 Idaho 101, 63 P.2d 159 (1936).

Interest of mortgagee is an interest adverse to holder of legal title. Pettengill v. Blackman, 30 Idaho 241, 164 P. 358 (1917).

Courts have generally held that in ordinary controversies arising out of questions of title between litigants "every interest or estate in land of which the law takes cognizance" may be considered. Carns v. Idaho-Iowa Lateral & Reservoir Co., 34 Idaho 330, 202 P. 1071 (1921).

Patentee of land over which right of way for a reservoir has been granted, or his successor in interest, is invested with right to institute proceedings to obtain a declaration of forfeiture for breach of condition subsequent and to quiet title in case of abandonment. Hurst v. Idaho-Iowa Lateral & Reservoir Co., 34 Idaho 342, 202 P. 1068 (1921).

Action to quiet title by removal of lien will lie, although lien is seemingly void on its face by virtue of § 45-510. Roberts v. Harrill, 42 Idaho 555, 247 P. 451 (1926).

In order to prevail in action to quiet title, plaintiff must first show that he has title to quiet. Steinour v. Oakley State Bank, 45 Idaho 472, 262 P. 1052 (1928).

Where mortgagor has failed to redeem mortgaged property within statutory period, he is divested of all title in same and can not bring action to quiet title. Steinour v. Oakley State Bank, 45 Idaho 472, 262 P. 1052 (1928).

In suit to quiet title, one must recover on strength of his own title and not on weakness of that of his adversary. Steinour v. Oakley State Bank, 45 Idaho 472, 262 P. 1052 (1928).

Tax Title Superior to Bondholder's Rights.

Sale by county of land located in the city of Lewiston which had been acquired by the county for delinquent taxes was not invalid as to a holder of bonds of special improvement district encompassing the land, because of the fact that the proportion of assessments for certain years against the land to pay the bonds were unpaid and delinquent at the time of the sale and no notice of the sale was given to the bond holder where the bond holder had not previously filed, in the office of the treasurer, a written request for such notice pursuant to statute. Herbert v. Kester, 62 Idaho 670, 115 P.2d 417 (1941).

Venue.

Action to quiet title to real estate must be prosecuted and maintained in the jurisdiction in which res or subject-matter is situated. Taylor v. Hulett, 15 Idaho 265, 97 P. 37 (1908).

Water Rights.

In action for adjudication of priorities in well waters tributary to lake, complaint was not demurrable because of failure to join all users of water from lake as defendants, since users not party to action were not bound by provisions of statute authorizing action and could not be injured by judgment therein, while intervening users had an ample opportunity to protect their rights as if suit had been brought under statute requiring that all water users be made parties. Owsley Canal Co. v. Henninger, 66 Idaho 485, 162 P.2d 389 (1945).

Prior to the 1981 amendments to this section and chapter 14, title 42, Idaho Code, the court, in an action to adjudicate water rights, was not required to name the department of water resources as a party to the action nor to dismiss the action if the department was not made a party. R.T. Nahas Co. v. Hulet, 106 Idaho 37, 674 P.2d 1036 (Ct. App. 1983), modified on other grounds, 114 Idaho 23, 752 P.2d 625 (Ct. App. 1988).

Cited in: Northwestern & Pac. Hypotheekbank v. Nord, 56 Idaho 86, 50 P.2d 4 (1935).

RESEARCH REFERENCES

Am. Jur. — 65 Am. Jur. 2d, Quieting Title and Determination of Adverse Claims, § 30 et seq.

C.J.S. — 74 C.J.S., Quieting Title, § 1 et seq.

A.L.R. — Common source of title doctrine. 5 A.L.R.3d 375.

Excessiveness or adequacy of attorneys' fees in matters involving real estate — modern cases. 10 A.L.R.5th 448.

6-402. Disclaimer or default — Costs. — If the defendant in such action disclaim in his answer any interest or estate in the property, or suffer judgment to be taken against him without answer, the plaintiff can not recover costs.

History.
C.C.P. 1881, § 477; R.S., R.C., & C.L., § 4539; C.S., § 6962; I.C.A., § 9-402.

JUDICIAL DECISIONS

ANALYSIS

Community property.
Costs.

Community Property.

Where community property is involved, filing of a disclaimer by the husband does not preclude the wife from defending or prosecuting her rights with respect to such property. Aker v. Aker, 52 Idaho 713, 20 P.2d 796, cert. denied, 290 U.S. 587, 54 S. Ct. 80, 78 L. Ed. 518 (1933).

Costs.

No costs should be adjudged against defendants in action to quiet title who fail to appear. Young v. First Nat'l Bank, 4 Idaho 323, 39 P. 557 (1895).

Ordinary action to quiet title is no different in right to recover attorney's fees than any other litigation in which no such provision is made. Beloit v. Green, 43 Idaho 265, 251 P. 621 (1926).

In a quiet title action, a court properly awarded costs against defendant trust where the trust did not effectively disclaim any interest in the real property; the trust attempted to be on both sides of the fence at the same time — on the one hand stating it had no current interest in the real property, and on the other alleging and seeking to prove that the decedents' owned the real property at their death, in which case the property would go to the trust. Hogg v. Wolske, 142 Idaho 549, 130 P.3d 1087 (2006).

RESEARCH REFERENCES

Am. Jur. — 65 Am. Jur. 2d, Quieting Title and Determination of Adverse Claims, § 85.

C.J.S. — 74 C.J.S., Quieting Title, § 68.

6-403. Termination of plaintiff's right. — In an action for the recovery of real property, where the plaintiff shows a right to recover at the time the action was commenced but it appears that his right has terminated during the pendency of the action, the verdict and judgment must be according to the fact, and the plaintiff may recover damages for withholding the property.

History.
C.C.P. 1881, § 478; R.S., R.C., & C.L., § 4540; C.S., § 6963; I.C.A., § 9-403.

6-404. Value of improvements as set-off. — When damages are claimed for withholding the property recovered, upon which permanent improvements have been made by a defendant, or those under whom he claims, holding under color of title adversely to the claim of the plaintiff, in good faith, the value of such improvements must be allowed as a set-off against such damages.

History.
C.C.P. 1881, § 470; R.S., R.C., & C.L., § 4541; C.S., § 6964; I.C.A., § 9-404.

RESEARCH REFERENCES

C.J.S. — 74 C.J.S., Quieting Title, §§ 88, 89.

6-405. Order for survey and examination. — Any person having a bona fide claim to the possession, title of, or interest in, any real property or mining claim, including any ledges thereof, which is, or which he has good reason to believe is, in the possession of another, either by surface or underground holdings or workings, and it is necessary for the ascertainment, enforcement or protection of such rights or interests, that an examination or survey of such property be had, and the person so in the possession thereof fails or refuses for three (3) days after demand on him made in writing, to permit such examination or survey to be made, the party desiring the same may apply to the court or the judge thereof, whether he have an action concerning such property pending in such court or not, for an order for such examination and survey.

Such application must be made upon written petition or statement under oath, setting out a description of the property, interest of the party therein, that the premises are in the possession of a party, naming him, the reason why such survey or examination is asked, the demand made for same, and refusal thereof.

The court or judge must appoint a time and place for hearing, of which notice, with a copy of the petition, must be served upon the adverse party at least three (3) days before the hearing and one (1) additional day for each twenty-five (25) miles between the place of service of notice and the hearing, and such hearing must be had and the testimony must be produced in the same manner as provided by section 8-411[, Idaho Code,] for hearings on injunctions.

If upon such hearing the court or judge is satisfied that either party is entitled to any relief or order for examination or survey of any property in the possession of the other, which has, by the papers in the proceedings been put in controversy, an order must be granted for such examination, survey and other privileges as the court or judge may deem just, and the order must specify as nearly as possible what the person in whose favor such order is granted may do.

Thereupon, such person may have free access, with such agents and assistants as may be allowed, to all parts of such property, with right to remove any loose rock, debris or other obstacle, when the same is necessary

to the making of a full inspection or survey of such property, but no such removal must be made without the consent of the adverse party or the order of the court or judge permitting the same.

The court or judge may also, upon proper showing with a view of producing such evidence as may be needed to determine the rights of the parties, allow work to be done on such property, but any work so permitted must be allowed only after the same is particularly defined, and must not be allowed in such manner as to interfere with the workings of the adverse party, and then only when the court is satisfied the adverse party is acting in bad faith and is infringing or attempting so to do, upon the rights of the party asking to do such work, and when there is no other reasonable or convenient mode for the production of the evidence necessary to settle the rights of the parties.

The party so asking to do work upon the premises of, or in the possession of another, must give good and sufficient security for the payment of all damages he may do the adverse party by reason of such work, and the court or judge must at every stage of the proceedings have due regard for the rights of all parties in interest.

History.
Act Feb. 10, 1887; R.S., R.C., & C.L., § 4542; C.S., § 6965; I.C.A., § 9-405.

STATUTORY NOTES

Compiler's Notes.
Section 8-411, referred to in the third paragraph, was repealed by S.L. 1975, ch. 242, § 1. For present provisions relating to injunctions, see Idaho Civil Procedure Rule 65.

The bracketed insertion, in the third paragraph, was added by the compiler to conform to the statutory citation style.

JUDICIAL DECISIONS

Analysis

Grounds for order.
"Mining claim" defined.
Purpose of section.

Grounds for Order.
Complaint alleging that plaintiff is a judgment creditor of defendant and has caused an execution to issue upon such judgment, and levy made upon an interest of defendant in a mining claim, does not entitle plaintiff to an order permitting plaintiff to examine and inspect such property prior to execution sale. Bacon v. Federal Mining & Smelting Co., 19 Idaho 136, 112 P. 1055 (1910).

Plaintiff must allege a state of facts showing necessity for inspection and examination of property before he is entitled to the order. Bacon v. Federal Mining & Smelting Co., 19 Idaho 136, 112 P. 1055 (1910).

"Mining Claim" Defined.
The term "mining claim" as used in this section does not include mining property, title to which is in claimant. Salisbury v. Lane, 7 Idaho 370, 63 P. 383 (1900).

The term "mining claim" as used herein includes patented as well as unpatented mining ground. Salisbury v. Lane, 7 Idaho 370, 63 P. 383 (1900).

Purpose of Section.
This section is merely a legislative declaration of what has been recognized as the general equity powers of the court and is intended to enable any person who claims possession of, title to, or interest in any real property or mining claim to make examination and inspection of the property for the purpose of protecting and preserving such possession, title or interest in such property. Bacon v. Federal Mining & Smelting Co., 19 Idaho 136, 112 P. 1055 (1910).

Since the statute authorizes application for survey order only if necessary to protect or

ascertain a property right, the complaint was properly dismissed where it failed to allege necessity for a survey order. Lisher v. Krasselt, 94 Idaho 513, 492 P.2d 52 (1972).

RESEARCH REFERENCES

C.J.S. — 74 C.J.S., Quieting Title, §§ 81, 83.

6-406. Form and service of order — Rights under. — The order must describe the property, and a copy thereof must be served on the owner or occupant; and thereupon such party may enter upon the property, with necessary surveyors and assistants, and make such survey and measurement, but if any unnecessary injury be done to the property he is liable therefor.

History.
C.C.P 1881, § 481; R.S., R.C., & C.L., § 4543; C.S., § 6966; I.C.A., § 9-406.

6-407. Injury pending foreclosure or conveyance after execution sale — Injunction. — The court may, by injunction, on good cause shown, restrain the party in possession from doing any act to the injury of real property during the foreclosure of a mortgage thereon, or after a sale on execution before a conveyance.

History.
C.C.P 1881, § 483; R.S., R.C., & C.L., § 4544; C.S., § 6967; I.C.A., § 9-407.

STATUTORY NOTES

Cross References.
Court may restrain waste, § 11-406.
Execution sales, § 11-301 et seq.
Foreclosure sales, § 6-101 et seq.

RESEARCH REFERENCES

C.J.S. — 74 C.J.S., Quieting Title, § 93.

6-408. Injury pending conveyance after sale — Damages. — When real property has been sold on execution, the purchaser thereof, or any person who may have succeeded to his interest, or any redemptioner, may, after his estate becomes absolute, recover damages for injury to the property by the tenant in possession after sale, and before possession is delivered under the conveyance.

History.
C.C.P. 1881, § 484; R.S., R.C., & C.L., § 4545; C.S., § 6968; I.C.A., § 9-408.

STATUTORY NOTES

Cross References.
Execution sales, § 11-301 et seq.

6-409. Alienation pending suit. — An action for the recovery of real property against a person in possession can not be prejudiced by any alienation made by such person, either before or after the commencement of the action.

History.
C.C.P. 1881, § 485; R.S., R.C., & C.L., § 4546; C.S., § 6969; I.C.A., § 9-409.

6-410. Mining customs admissible in evidence. — In actions respecting mining claims, proof must be admitted of the customs, usages or regulations established and in force at the bar or diggings embracing such claim, and such customs, usages or regulations, when not in conflict with the laws of this state, must govern the decision of the action.

History.
C.C.P. 1881, § 486; R.S., R.C., & C.L., § 4547; C.S., § 6970; I.C.A., § 9-410.

STATUTORY NOTES

Cross References.
Possessory actions for public lands, § 58-901 et seq.

JUDICIAL DECISIONS

Cited in: Salisbury v. Lane, 7 Idaho 370, 63 P. 383 (1900).

6-411. Quiet title action — Maintenance against mortgage barred by statute of limitations. — An action may be maintained to quiet title to lands against any mortgage, the enforcement and collection of which is barred by the Statute of Limitations of the State of Idaho, and which, except for the fact that its collection and enforcement is so barred, would constitute a lien upon such lands.

History.
1951, ch. 117, § 1, p. 272.

STATUTORY NOTES

Cross References.
Limitation of actions, § 5-201 et seq.

RESEARCH REFERENCES

C.J.S. — 74 C.J.S., Quieting Title, § 32.

6-412. Quiet title action — Maintenance against judgment barred by statute of limitations. — An action may be maintained to quiet title to lands against any judgment, the enforcement and collection of which is barred by the Statute of Limitations of the State of Idaho and which,

except for the fact that its collection and enforcement is so barred by the Statute of Limitations, would constitute a lien upon said lands.

History.
1951, ch. 117, § 2, p. 272.

STATUTORY NOTES

Cross References.
Limitation of actions, § 5-201 et seq.

RESEARCH REFERENCES

Am. Jur. — 65 Am. Jur. 2d, Quieting Title and Determination of Adverse Claims, § 26.

6-413. Quiet title action — Decree. — The party seeking to maintain such action shall be entitled to a decree quieting title to his lands against the lien of any such judgment or mortgage upon proof that the collection and enforcement of such judgment or mortgage is barred by the Statute of Limitations and without the necessity of proving that any such judgment or the indebtedness secured by any such mortgage has been paid.

History.
1951, ch. 117, § 3, p. 272.

STATUTORY NOTES

Cross References.
Limitation of actions, § 5-201 et seq.

Effective Dates.
Section 4 of S.L. 1951, ch. 117 declared an emergency. Approved March 13, 1951.

6-414. Occupant of real estate — Stay of execution for possession — When authorized. — Where an occupant of real estate has color of title thereto, and in good faith has made valuable improvements thereon, and is afterwards in a proper action found not to be the owner, no execution shall issue to put the owner in possession of the same after the filing of an action as hereinafter provided, until the provisions of this act have been complied with; provided said occupant may elect, after filing of the action, to exercise his right to remove such improvements if it can be done without injury otherwise to such real estate.

History.
1972, ch. 118, § 1, p. 234.

STATUTORY NOTES

Compiler's Notes.
The words "this act" refer to S.L. 1972, ch. 118, compiled as §§ 6-414 to 6-418.

JUDICIAL DECISIONS

ANALYSIS

Color of title.
Good faith.

Color of Title.

A writing of some sort, purporting to give title, which on its face professes to pass title, which does not from want of title in the person making it, but not so obviously imperfect as to be apparent to one not skilled in the law that it is not good, is essential to a claim of color of title. Fouser v. Paige, 101 Idaho 294, 612 P.2d 137 (1980).

Good Faith.

Under any definition of good faith, actual notice of another's interest negates the good faith necessary to recover in restitution. Fouser v. Paige, 101 Idaho 294, 612 P.2d 137 (1980).

Wrongdoer, with knowledge of his wrongdoing and of the rights of the true owner, has no claim to permanent improvements placed upon the property unlawfully in his possession. Therefore, a district court erred when it ordered the payment of restitution to the losing party in a quiet title action after there was a finding of fraud on his part because this undermined a determination of good faith. Bach v. Miller, 144 Idaho 142, 158 P.3d 305 (2007).

6-415. Occupant of real estate — Owner's complaint for possession — Contents — Trial. — Such complaint must set forth the grounds on which the owner seeks relief, stating as accurately as practicable the value of the real estate, exclusive of the improvements thereon made by the claimant or his grantors, and the value of such improvements. The issues joined thereon must be tried by the court, and the value of the real estate and of such improvements must be separately ascertained on the trial.

History.
1972, ch. 118, § 2, p. 234.

6-416. Occupant of real estate — Determination of right to possession — Tenants in common — Partition procedure. — The owner in the main action may thereupon pay the value of the improvements determined on trial and take the property, but should he fail to do so after a reasonable time not to exceed one (1) year, to be fixed by the court, the claimant may take the property upon paying its value determined on trial, less any amount paid by claimant or his predecessor on a judicial or tax sale, exclusive of the improvements. If this is not done within said time, to be fixed by the court, the parties will be held to be tenants in common of all the real estate, including the improvements, each holding an interest proportionate to the values ascertained on the trial; provided, further, that thereafter, upon the motion of either party, proceedings may be had for partition thereof in accordance with chapter 5, title 5 [title 6], Idaho Code.

History.
1972, ch. 118, § 3, p. 234.

STATUTORY NOTES

Compiler's Notes.

The bracketed insertion, near the end of the section, was added by the compiler to correct the reference to chapter 5, title 6, Idaho Code, "Partition of Real Estate."

6-417. Color of title — Definition. — For definition in this act, a person having color of title shall include (a) a purchaser in good faith at any judicial or tax sale made by the proper person or officer, whether such person or officer has sufficient authority to sell or not, unless such want of authority was known to such purchaser at the time of the sale; and (b) a person who has occupied a tract of real estate if he, or those under whom he claims, have at any time during such occupancy with the knowledge or consent, express or implied, of the real owner made any valuable improvements thereon; a person's rights shall pass to his assignees or representatives; but nothing in this act shall be construed to give tenants color of title (i) against their landlords or (ii) against the state of Idaho or any subdivision thereof.

History.
1972, ch. 118, § 4, p. 234.

STATUTORY NOTES

Compiler's Notes.
The words "this act" refer to S.L. 1972, ch. 118, compiled as §§ 6-414 to 6-418.

JUDICIAL DECISIONS

ANALYSIS

Good faith.
Necessity of writing.

Good Faith.
Under any definition of good faith, actual notice of another's interest negates the good faith necessary to recover in restitution. Fouser v. Paige, 101 Idaho 294, 612 P.2d 137 (1980).

Necessity of Writing.
A writing of some sort, purporting to give title, which on its face professes to pass title, which does not from want of title in the person making it, but not so obviously imperfect as to be apparent to one not skilled in the law that it is not good, is essential to a claim of color of title. Fouser v. Paige, 101 Idaho 294, 612 P.2d 137 (1980).

6-418. Occupant of real estate — Owner's right to possession — Limitations. — The owner in the main action is entitled to an execution to put him in possession of his property in accordance with the provisions of this act, but not otherwise.

History.
1972, ch. 118, § 5, p. 234.

STATUTORY NOTES

Compiler's Notes.
The words "this act" refer to S.L. 1972, ch. 118, compiled as §§ 6-414 to 6-418.

Effective Dates.
Section 6 of S.L. 1972, ch. 118 provided the act should take effect on and after July 1, 1972.

JUDICIAL DECISIONS

Cited in: Gage v. Harris, 119 Idaho 451, 807 P.2d 1289 (Ct. App. 1991).

CHAPTER 5

PARTITION OF REAL ESTATE

6-501. When partition may be had. — When several cotenants hold and are in possession of real property as parceners, joint tenants or tenants in common, in which one (1) or more of them have an estate of inheritance, or for life or lives, or for years, an action may be brought by one (1) or more of such persons for a partition thereof, according to the respective rights of the persons interested therein, and for a sale of such property, or a part thereof, if it appears that a partition can not be made without great prejudice to the owners.

History.
C.C.P. 1881, § 487; R.S., R.C., & C.L., § 4560; C.S., § 6976; I.C.A., § 9-501.

STATUTORY NOTES

Cross References.

Divorce, partition of community property or homestead, § 32-713.

Judgments affecting land to be recorded with deed records, § 31-2407.

Lis pendens, § 5-505.

Partition fences, §§ 35-103 — 35-112.

Partition in probate proceedings, § 15-3-911.

Record of judgments in partition, to be recorded with deeds, § 31-2407; decree imparts notice, § 31-2408.

Unknown owners or heirs as parties, § 5-326.

Venue of actions, § 5-401.

JUDICIAL DECISIONS

Analysis

Jurisdiction.
Rescission.

Jurisdiction.

The statutory language of this section clearly vests the district court with equitable powers to apportion the proceeds of the sale of jointly held property after the sale: thus, any argument that the court lost jurisdiction when the property was sold was without merit. Troupis v. Summer, — Idaho —, 218 P.3d 1138 (2009).

Rescission.

In dispute between cellular phone company and landowners, district court erred when it determined that partition was the sole remedy. The district court failed to balance the equities to determine if rescission was the appropriate remedy. Brewer v. Wash. RSA No. 8, L.P., 145 Idaho 735, 184 P.3d 860 (2008).

Cited in: Richardson v. Ruddy, 15 Idaho 488, 98 P. 842 (1908); Leggat v. Blomberg, 15 Idaho 496, 98 P. 723 (1908).

RESEARCH REFERENCES

Am. Jur. — 59A Am. Jur. 2d, Partition, § 71 et seq.

C.J.S. — 68 C.J.S., Partition, § 1 et seq.

A.L.R. — Contractual provisions as affecting right to judicial partition. 37 A.L.R.3d 962.

Right to partition of overriding royalty interest in oil and gas lease hold. 58 A.L.R.3d 1052.

Judicial partition of land by lot or chance, 32 A.L.R.4th 909.

6-502. Complaint — Allegations of interests of parties. — The interests of all persons in the property, whether such persons be known or unknown, must be set forth in the complaint specifically and particularly as far as known to the plaintiff; and if one (1) or more of the parties, or the share or quantity of interest of any one of the parties be unknown to the plaintiff, or be uncertain or contingent, or the ownership of the inheritance depend upon an executory devise, or the remainder be a contingent remainder, so that such parties can not be named, that fact must be set forth in the complaint.

History.

C.C.P. 1881, § 488; R.S., R.C., & C.L., § 4561; C.S., § 6977; I.C.A., § 9-502.

RESEARCH REFERENCES

Am. Jur. — 59A Am. Jur. 2d, Partition, §§ 107 to 111.

C.J.S. — 68 C.J.S., Partition, § 92 et seq.

6-503. Parties — Lienholders and purchasers of record. — No person having a conveyance of, or claiming a lien on, the property, or of some part of it, need be made a party to the action, unless such conveyance or lien appear of record.

History.
C.C.P. 1881, § 489; R.S., R.C., & C.L., § 4562; C.S., § 6978; I.C.A., § 9-503.

JUDICIAL DECISIONS

Mortgages of Record.
This section requires that those holding mortgages of record shall be made parties. McKenzie v. Miller, 35 Idaho 354, 206 P. 505 (1922).

Mortgagee of undivided interest may appear in partition proceeding and object to confirmation of referee's report on ground that the property allotted to his mortgagor is less than he is entitled to, and less than the amount of his mortgage. McKenzie v. Miller, 35 Idaho 354, 206 P. 505 (1922).

RESEARCH REFERENCES

Am. Jur. — 59A Am. Jur. 2d, Partition, §§ 90 to 98.

C.J.S. — 68 C.J.S., Partition, § 81 et seq.

6-504. Lis pendens — Filing and effect. — Immediately after filing the complaint in the district court the plaintiff must file with the recorder of the county, or of the several counties in which the property is situated, either a copy of such complaint or a notice of the pendency of the action, containing the names of the parties so far as known, the object of the action, and a description of the property to be affected thereby. From the time of the filing it shall be deemed notice to all persons.

History.
C.C.P. 1881, § 490; R.S., R.C., & C.L., § 4563; C.S., § 6979; I.C.A., § 9-504.

STATUTORY NOTES

Cross References.
Lis pendens in general, § 5-505.

JUDICIAL DECISIONS

Cited in: Federal Land Bank v. Parsons, 116 Idaho 545, 777 P.2d 1218 (Ct. App. 1989).

RESEARCH REFERENCES

C.J.S. — 68 C.J.S., Partition, § 200 et seq.

6-505. Summons — How directed. — The summons must be directed to all the joint tenants and tenants in common, and all persons having any interest in, or any liens of record by mortgage, judgment, or otherwise upon the property, or upon any particular portion thereof; and generally, to all persons unknown, who have or claim any interest in the property.

History.
C.C.P. 1881, § 491; R.S., R.C., & C.L., § 4564; C.S., § 6980; I.C.A., § 9-505.

JUDICIAL DECISIONS

Service of Summons on Mortgagee.
Service of summons on mortgagee gives him right to object and be heard so far as his rights and interests may be injuriously affected. McKenzie v. Miller, 35 Idaho 354, 206 P. 505 (1922).

RESEARCH REFERENCES

Am. Jur. — 59A Am. Jur. 2d, Partition, § 99.

C.J.S. — 68 C.J.S., Partition, §§ 87 to 89.

6-506. Service by publication. — If a party having a share or interest is unknown, or any one of the known parties reside out of the state, or cannot be found therein, and such fact is made to appear by affidavit, the summons may be served on such absent or unknown party by publication, as in other cases. When publication is made, the summons, as published, must be accompanied by a brief description of the property which is the subject of the action.

History.
C.C.P. 1881, § 492; R.S., R.C., & C.L., § 4565; C.S., § 6981; I.C.A., § 9-506.

STATUTORY NOTES

Cross References.
Publication of summons, §§ 5-508, 5-509.

RESEARCH REFERENCES

Am. Jur. — 59A Am. Jur. 2d, Partition, § 100.

C.J.S. — 68 C.J.S., Partition, § 89.

6-507. Answer. — The defendants who have been personally served with the summons and a copy of the complaint, or who have appeared without such service, must set forth in their answers fully and particularly, the origin, nature and extent of their respective interests in the property, and if such defendants claim a lien on the property by mortgage, judgment or otherwise, they must state the original amount and date of the same, and the sum remaining due thereon, also whether the same has been secured in any other way or not; and if secured, the nature and extent of such security, or they are deemed to have waived their right to such lien.

History.
C.C.P. 1881, § 493; R.S., R.C., & C.L., § 4566; C.S., § 6982; I.C.A., § 9-507.

RESEARCH REFERENCES

Am. Jur. — 59A Am. Jur. 2d, Partition, §§ 101 to 111.

C.J.S. — 68 C.J.S., Partition, § 96.

6-508. Rights of all parties may be determined. — The rights of the several parties, plaintiff as well as defendant, may be put in issue, tried and determined in such action; and when a sale of the premises is necessary, the title must be ascertained by proof to the satisfaction of the court before the judgment of sale can be made; and where service of the complaint has been made by publication, like proof must be required of the right of the absent or unknown parties before such judgment is rendered, except that where there are several unknown persons having an interest in the property, their rights may be considered together in the action, and not as between themselves.

History.
C.C.P. 1881, § 494; R.S., R.C., & C.L., § 4567; C.S., § 6983; I.C.A., § 9-508.

JUDICIAL DECISIONS

Cited in: Troupis v. Summer, — Idaho —, 218 P.3d 1138 (2009).

RESEARCH REFERENCES

C.J.S. — 68 C.J.S., Partition, § 108 et seq.

6-509. Partial partition. — Whenever from any cause it is, in the opinion of the court, impracticable or highly inconvenient to make a complete partition in the first instance among all the parties in interest, the court may first ascertain and determine the shares or interests respectively held by the original cotenants, and thereupon adjudge and cause a partition to be made as if such original cotenants were the parties and sole parties in interest and the only parties to the action, and thereafter may proceed in like manner to adjudge and make partition separately of each share or portion so ascertained and allotted as between those claiming under the original tenant to whom the same shall have been so set apart, or may allow them to remain tenants in common thereof as they may desire.

History.
C.C.P. 1881, § 495; R.S., R.C., & C.L., § 4568; C.S., § 6984; I.C.A., § 9-509.

JUDICIAL DECISIONS

Partial Partition.

Where it appears in suit for partition that it is impracticable or inconvenient to make complete partition in the first instance among all parties, court may direct a partition among two or more of the parties, and from time to time thereafter may determine rights of the other parties and render judgment accordingly. Richardson v. Ruddy, 10 Idaho 151, 77 P. 972 (1904).

RESEARCH REFERENCES

Am. Jur. — 59A Am. Jur. 2d, Partition, § 77.

C.J.S. — 68 C.J.S., Partition, § 148.

6-510. Lienholders — Determination of rights. — If it appears to the court, by the certificate of the county recorder or clerk, or by the sworn or verified statement of any person who may have examined or searched the records, that there are outstanding liens or encumbrances of record upon such real property, or any part or portion thereof, which existed and were of record at the time of the commencement of the action, and the persons holding such liens are not made parties to the action, the court must either order such persons to be made parties to the action by an amendment or supplemental complaint, or appoint a referee to ascertain whether or not such liens or encumbrances have been paid, or if not paid what amount remains due thereon, and their order among the liens or encumbrances severally held by such persons and the parties to the action, and whether the amount remaining due thereon has been secured in any manner, and if secured, the nature and extent of the security.

History.

C.C.P. 1881, § 496; R.S., R.C., & C.L., § 4569; C.S., § 6985; I.C.A., § 9-510.

RESEARCH REFERENCES

Am. Jur. — 59A Am. Jur. 2d, Partition, §§ 95, 96.

C.J.S. — 68 C.J.S., Partition, § 83.

6-511. Notice to lienholders. — The plaintiff must cause a notice to be served a reasonable time previous to the day for appearance before the referee appointed as provided in the last section, on each person having outstanding liens of record who is not a party to the action, to appear before the referee at a specified time and place, to make proof by his own affidavit or otherwise, of the amount due or to become due, contingently or absolutely thereon. In case such person be absent or his residence be unknown, service may be made by publication or notice to his agents, under the direction of the court, in such manner as may be proper. The report of the referee thereon must be made to the court, and must be confirmed, modified, or set aside and a new reference ordered, as the justice of the case may require.

History.

C.C.P. 1881, § 497; R.S., R.C., & C.L., § 4570; C.S., § 6986; I.C.A., § 9-511.

STATUTORY NOTES

Cross References.
References and trials by masters generally, Idaho Civil Procedure Rules 53(a)(1) to 53(e)(5).

6-512. Partition — Sale — Referees. — If it be alleged in the complaint and established by evidence, or if it appear by the evidence without such allegation in the complaint, to the satisfaction of the court, that the property, or any part of it, is so situated that partition cannot be made without great prejudice to the owners, the court may order a sale thereof. Otherwise, upon the requisite proofs being made, it must order a partition according to the respective rights of the parties as ascertained by the court, and appoint three (3) referees therefor; and must designate the portion to remain undivided for the owners whose interests remain unknown, or are not ascertained.

History.
C.C.P. 1881, § 498; R.S., R.C., & C.L., § 4571; C.S., § 6987; I.C.A., § 9-512.

STATUTORY NOTES

Cross References.
References and trials by masters generally, Idaho Civil Procedure Rules 53(a)(1) to 53(e)(5).

JUDICIAL DECISIONS

Effect of Interlocutory Decree.
Interlocutory decree entered in action for partition of real property determines right to partition and fixes respective rights of parties. Richardson v. Ruddy, 15 Idaho 488, 98 P. 842 (1908).

Cited in: Cox v. Cox, 138 Idaho 881, 71 P.3d 1028 (2003).

RESEARCH REFERENCES

Am. Jur. — 59A Am. Jur. 2d, Partition, §§ 118 to 121, 131, 133, 135, 136, 139 to 143, 145 to 149, 173.

C.J.S. — 68 C.J.S., Partition, § 163 et seq.

6-513. Duties of referees. — In making the partition the referees must divide the property and allot the several portions thereof to the respective parties, quality and quantity relatively considered, according to the respective rights of the parties as determined by the court, pursuant to the provisions of this chapter, designating the several portions by proper landmarks, and may employ a surveyor with the necessary assistants to aid them.

History.
C.C.P. 1881, § 499; R.S., R.C., & C.L., § 4572; C.S., § 6988; I.C.A., § 9-513.

JUDICIAL DECISIONS

Cited in: Richardson v. Ruddy, 15 Idaho 488, 98 P. 842 (1908).

RESEARCH REFERENCES

Am. Jur. — 59A Am. Jur. 2d, Partition, §§ 118 to 121.

C.J.S. — 68 C.J.S., Partition, § 140 et seq.

6-514. Report of referees. — The referees must make a report of their proceedings, specifying the manner in which they executed their trust, and describing the property divided, and the shares allotted to each party, with a particular description of each share.

History.
C.C.P. 1881, § 500; R.S., R.C., & C.L., § 4573; C.S., § 6989; I.C.A., § 9-514.

JUDICIAL DECISIONS

Report of Referees.
Report of referees appointed to partition real property presents merely the question whether partition was made in accordance with the decree of the court. Richardson v. Ruddy, 15 Idaho 488, 98 P. 842 (1908).

RESEARCH REFERENCES

Am. Jur. — 59A Am. Jur. 2d, Partition, §§ 124, 126, 127.

C.J.S. — 68 C.J.S., Partition, § 150.

6-515. Report of referees — Confirmation — Judgment. — The court may confirm, change, modify or set aside the report, and if necessary appoint new referees. Upon the report being confirmed, judgment must be rendered that such partition be effectual forever, which judgment is binding and conclusive:

1. On all persons named as parties to the action, and their legal representatives, who have at the time any interest in the property divided, or any part thereof, as owners in fee or as tenants for life or for years, or as entitled to the reversion, remainder, or the inheritance of such property, or of any part thereof, after the determination of a particular estate therein, and who by any contingency may be entitled to a beneficial interest in the property, or who have an interest in any undivided share thereof, as tenants for years or for life.

2. On all persons interested in the property, who may be unknown, to whom notice has been given of the action for partition by publication.

3. On all other persons claiming from such parties or persons or either of them. And no judgment is invalidated by reason of the death of any party before final judgment or decree; but such judgment or decree is as conclusive against the heirs, legal representatives or assigns of such decedent as if it had been entered before his death.

History.
C.C.P. 1881, § 501; R.S., R.C., & C.L., § 4574; C.S., § 6990; I.C.A., § 9-515.

JUDICIAL DECISIONS

ANALYSIS

Contesting of report.
Hearing on report.

Contesting of Report.

Party may appear to contest partition embodied in referee's report on the ground that it is not according to the interlocutory decree or that it is unfair, although the interlocutory decree was entered against such party by default. McKenzie v. Miller, 35 Idaho 354, 206 P. 505 (1922).

Mortgagee of undivided interest may appear in partition proceeding and object to confirmation of referee's report on the ground that the property allotted to his mortgagor is less than that to which he is entitled, and less than the amount of the mortgage. McKenzie v. Miller, 35 Idaho 354, 206 P. 505 (1922).

Hearing on Report.

Hearing on report of referees appointed to partition real property should be for purpose of ascertaining whether directions of court were carried out, and evidence should be received on this question only, except when fairness of referees is involved. Richardson v. Ruddy, 15 Idaho 488, 98 P. 842 (1908).

Where supreme court was unable to harmonize mistakes of facts and conclusions of law appearing in decree of trial court, it was necessary to reverse judgment and remand same with instructions. Andrews v. Grover, 66 Idaho 742, 168 P.2d 821 (1946).

RESEARCH REFERENCES

Am. Jur. — 59A Am. Jur. 2d, Partition, §§ 124, 126 to 128.

C.J.S. — 68 C.J.S., Partition, § 150 et seq.

6-516. Effect of judgment on tenants for years. — The judgment does not affect tenants for years less than ten (10) to the whole of the property which is the subject of the partition.

History.
C.C.P. 1881, § 502; R.S., R.C., & C.L., § 4575; C.S., § 6991; I.C.A., § 9-516.

RESEARCH REFERENCES

C.J.S. — 68 C.J.S., Partition, § 202.

6-517. Allowance of expenses of referees. — The expenses of the referees, including those of a surveyor and his assistants when employed, must be ascertained and allowed by the court, and the amount thereof, together with the fees allowed by the court, in its discretion, to the referees, must be apportioned among the different parties to the action equitably.

History.
C.C.P. 1881, § 503; R.S., R.C., & C.L., § 4576; C.S., § 6992; I.C.A., § 9-517.

RESEARCH REFERENCES

C.J.S. — 68 C.J.S., Partition, § 224.

6-518. Lien on undivided interest — Charge on share assigned to lienor. — When a lien is on an undivided interest or estate of any of the parties, such lien, if a partition be made, shall thenceforth be a charge only on the share assigned to such party; but such share must first be charged with its just proportion of the costs of the partition, in preference to such lien.

History.
C.C.P. 1881, § 504; R.S., R.C., & C.L., § 4577; C.S., § 6993; I.C.A., § 9-518.

RESEARCH REFERENCES

Am. Jur. — 59A Am. Jur. 2d, Partition, § 229.
C.J.S. — 68 C.J.S., Partition, § 202.

6-519. Estate for life or years may be set off. — When a part of the property only is ordered to be sold, if there be an estate for life or years in an undivided share of the whole property, such estate may be set off in any part of the property not ordered to be sold.

History.
C.C.P. 1881, § 505; R.S., R.C., & C.L., § 4578; C.S., § 6994; I.C.A., § 9-519.

RESEARCH REFERENCES

C.J.S. — 68 C.J.S., Partition, § 126.
A.L.R. — Modern status of the Massachusetts or business trust. 88 A.L.R.3d 704.

6-520. Application of proceeds of sale of encumbered property. — The proceeds of the sale of encumbered property must be applied under the direction of the court as follows:

1. To pay its just proportion of the general costs of the action.
2. To pay the costs of the reference.
3. To satisfy and cancel of record the several liens in their order of priority, by payment of the sums due and to become due; the amount due to be verified by affidavit at the time of payment.
4. The residue among the owners of the property sold, according to their respective shares therein.

History.
C.C.P. 1881, § 506; R.S., R.C., & C.L., § 4579; C.S., § 6995; I.C.A., § 9-520.

RESEARCH REFERENCES

Am. Jur. — 59A Am. Jur. 2d, Partition, §§ 186, 187.
C.J.S. — 68 C.J.S., Partition, § 213.

6-521. Resort to other securities compelled. — Whenever any party to an action who holds a lien upon the property, or any part thereof, has

other securities for the payment of the amount of such lien, the court may, in its discretion, order such securities to be exhausted before a distribution of the proceeds of sale, or may order a just reduction to be made from the amount of the lien on the property on account thereof.

History.
C.C.P. 1881, § 507; R.S., R.C., & C.L., § 4580; C.S., § 6996; I.C.A., § 9-521.

6-522. Distribution of proceeds. — The proceeds of sale and the securities taken by the referees, or any part thereof, must be distributed by them to the persons entitled thereto, whenever the court so directs. But in case no direction be given, all of such proceeds and securities must be paid into court or deposited therein, or as directed by the court.

History.
C.C.P. 1881, § 508; R.S., R.C., & C.L., § 4581; C.S., § 6997; I.C.A., § 9-522.

JUDICIAL DECISIONS

Cited in: Troupis v. Summer, — Idaho —, 218 P.3d 1138 (2009).

RESEARCH REFERENCES

Am. Jur. — 59A Am. Jur. 2d, Partition, §§ 186, 187.

C.J.S. — 68 C.J.S., Partition, § 211 et seq.

6-523. Payment into court — Continuance of action. — When the proceeds of the sale of any share or parcel belonging to persons who are parties to the action, and who are known, are paid into court, the action may be continued as between such parties for the determination of their respective claims thereto, which must be ascertained and adjudged by the court. Further testimony may be taken in court or by a referee, at the discretion of the court, and the court may, if necessary, require such parties to present the facts or law in controversy, by pleadings as in an original action.

History.
C.C.P. 1881, § 509; R.S., R.C., & C.L., § 4582; C.S., § 6998; I.C.A., § 9-523.

RESEARCH REFERENCES

C.J.S. — 68 C.J.S., Partition, § 108.

6-524. Conduct of sale — Contents of notice. — All sales of real property made by referees under this chapter must be made at public auction to the highest bidder, upon notice published in the manner required for the sale of real property on execution. The notice must state the terms of sale, and if the property or any part of it is to be subject to a prior estate, charge or lien, that must be stated in the notice.

History.
C.C.P. 1881, § 510; R.S., R.C., & C.L., § 4583; C.S., § 6999; I.C.A., § 9-524.

STATUTORY NOTES

Cross References.
Sales on execution, §§ 11-302, 11-310.

JUDICIAL DECISIONS

Cited in: Cox v. Cox, 138 Idaho 881, 71 P.3d 1028 (2003).

RESEARCH REFERENCES

Am. Jur. — 59A Am. Jur. 2d, Partition, §§ 166 to 169.

C.J.S. — 68 C.J.S., Partition, § 163 et seq.

6-525. Terms of sale. — The court must, in the order for sale, direct the terms of credit which may be allowed for the purchase-money of any portion of the premises of which it may direct a sale on credit, and for that portion of which the purchase-money is required by the provisions hereinafter contained, to be invested for the benefit of unknown owners, infants or parties out of the state.

History.
C.C.P. 1881, § 511; R.S., R.C., & C.L., § 4584; C.S., § 7000; I.C.A., § 9-525.

JUDICIAL DECISIONS

Cited in: Cox v. Cox, 138 Idaho 881, 71 P.3d 1028 (2003).

RESEARCH REFERENCES

C.J.S. — 68 C.J.S., Partition, §§ 172, 173.

6-526. Security for purchase-money. — The referees may take separate mortgages and other securities for the whole or convenient portions of the purchase-money of such parts of the property as are directed by the court to be sold on credit for the shares of any known owner of full age, in the name of such owner; and for the shares of an infant in the name of the guardian of such infant; and for other shares in the name of the clerk of the court and his successors in office.

History.
C.C.P. 1881, § 512; R.S., R.C., & C.L., § 4585; C.S., § 7001; I.C.A., § 9-526.

6-527. Compensation of tenants for life or years. — The person entitled to a tenancy for life or years, whose estate has been sold, is entitled to receive such sum as may be deemed a reasonable satisfaction for such

estate, and which the person so entitled may consent to accept instead thereof, by an instrument in writing filed with the clerk of the court. Upon the filing of such consent the clerk must enter the same in the minutes of the court.

History.
C.C.P. 1881, § 513; R.S., R.C., & C.L., § 4586; C.S., § 7002; I.C.A., § 9-527.

RESEARCH REFERENCES

Am. Jur. — 59A Am. Jur. 2d, Partition, §§ 186, 187.

C.J.S. — 68 C.J.S., Partition, §§ 215, 216.

6-528. Consent not given — Compensation fixed by court. — If such consent be not given, filed and entered as provided in the last section, at or before a judgment of sale is rendered, the court must ascertain and determine what proportion of the proceeds of the sale, after deducting expenses, will be a just and reasonable sum to be allowed on account of such estate, and must order the same to be paid to such party, or deposited in court for him, as the case may require.

History.
C.C.P. 1881, § 514; R.S., R.C., & C.L., § 4587; C.S., § 7003; I.C.A., § 9-528.

6-529. Protection of unknown parties. — If the persons entitled to such estate for life or years be unknown, the court must provide for the protection of their rights in the same manner, as far as may be, as if they were known and had appeared.

History.
C.C.P. 1881, § 515; R.S., R.C., & C.L., § 4588; C.S., § 7004; I.C.A., § 9-529.

RESEARCH REFERENCES

Am. Jur. — 59A Am. Jur. 2d, Partition, § 138.

C.J.S. — 68 C.J.S., Partition, § 136.

6-530. Compensation for contingent interest. — In all cases of sales when it appears that any person has a vested or contingent future right or estate in any of the property sold, the court must ascertain and settle the proportionate value of such contingent or vested right or estate, and must direct such proportion of the proceeds of the sale to be invested, secured, or paid over in such manner as to protect the rights and interests of the parties.

History.
C.C.P. 1881, § 516; R.S., R.C., & C.L., § 4589; C.S., § 7005; I.C.A., § 9-530.

RESEARCH REFERENCES

Am. Jur. — 59A Am. Jur. 2d, Partition, §§ 186, 187.

C.J.S. — 68 C.J.S., Partition, § 136.

6-531. Notice of terms of sale. — In all cases of sales of property the terms must be made known at the time; and if the premises consist of distinct farms or lots, they must be sold separately.

History.
C.C.P. 1881, § 517; R.S., R.C., & C.L., § 4590; C.S., § 7006; I.C.A., § 9-531.

RESEARCH REFERENCES

C.J.S. — 68 C.J.S., Partition, § 163 et seq.

6-532. Purchase by referees and guardians prohibited. — Neither of the referees, nor any person for the benefit of either of them, can be interested in any purchase; nor can a guardian of an infant party be interested in the purchase of any real property being the subject of the action, except for the benefit of the infant. All sales contrary to the provisions of this section are void.

History.
C.C.P. 1881, § 518; R.S., R.C., & C.L., § 4591; C.S., § 7007; I.C.A., § 9-532.

RESEARCH REFERENCES

Am. Jur. — 59A Am. Jur. 2d, Partition, § 112.

C.J.S. — 68 C.J.S., Partition, § 197.

6-533. Report of sale. — After completing a sale of the property, or any part thereof ordered to be sold, the referees must report the same to the court with a description of the different parcels of lands sold to each purchaser; the name of the purchaser; the price paid or secured; the terms and conditions of the sale, and the securities, if any, taken. The report must be filed in the office of the clerk.

History.
C.C.P. 1881, § 519; R.S., R.C., & C.L., § 4592; C.S., § 7008; I.C.A., § 9-533.

RESEARCH REFERENCES

C.J.S. — 68 C.J.S., Partition, § 186.

6-534. Confirmation and order for conveyance. — If the sale be confirmed by the court, an order must be entered directing the referees to execute conveyances and take securities pursuant to such sale, which they are hereby authorized to do. Such order may also give directions to them respecting the disposition of the proceeds of the sale.

History.
C.C.P. 1881, § 520; R.S., R.C., & C.L., § 4593; C.S., § 7009; I.C.A., § 9-534.

RESEARCH REFERENCES

C.J.S. — 68 C.J.S., Partition, §§ 187 to 189.

6-535. Lienholders as purchasers. — When a party entitled to a share of the property, or an encumbrancer entitled to have his lien paid out of the sale, becomes a purchaser, the referees may take his receipt for so much of the proceeds of the sale as belongs to him.

History.
C.C.P. 1881, § 521; R.S., R.C., & C.L., § 4594; C.S., § 7010; I.C.A., § 9-535.

6-536. Record and effect of conveyance. — The conveyances must be recorded in the county where the premises are situated, and shall be a bar against all persons interested in the property in any way, who shall have been named as parties in the action, and against all such parties and persons as were unknown, if the summons were served by publication, and against all persons claiming under them, or either of them, and against all persons having unrecorded deeds or liens at the commencement of the action.

History.
C.C.P. 1881, § 522; R.S., R.C., & C.L., § 4595; C.S., § 7011; I.C.A., § 9-536.

RESEARCH REFERENCES

C.J.S. — 68 C.J.S., Partition, § 200 et seq.

6-537. Investment of proceeds belonging to unknowns or nonresidents. — When there are proceeds of sale belonging to an unknown owner, or to a person without the state, who has no legal representative within it, the same must be invested in securities at interest for the benefit of the persons entitled thereto.

History.
C.C.P. 1881, § 523; R.S., R.C., & C.L., § 4596; C.S., § 7012; I.C.A., § 9-537.

RESEARCH REFERENCES

C.J.S. — 68 C.J.S., Partition, § 211.

6-538. Investment — When made in recorder's name. — When the security of the proceeds of sale is taken, or when an investment of any such proceeds is made, it must be done, except as herein otherwise provided, in the name of the recorder of the county where the papers are filed, and his

successors in office, who must hold the same for the use and benefit of the parties interested, subject to the order of the court.

History.
C.C.P. 1881, § 524; R.S., R.C., & C.L., § 4597; C.S., § 7013; I.C.A., § 9-538.

RESEARCH REFERENCES

C.J.S. — 68 C.J.S., Partition, § 211.

6-539. Investment — When made in parties' names. — When security is taken by the referees on a sale, and the parties interested in such security, by an instrument in writing, under their hands, delivered to the referee, agree upon the shares and proportions to which they are respectively entitled, or when shares and proportions have been previously adjudged by the court, such securities must be taken in the names of and payable to the parties respectively entitled thereto, and must be delivered to such parties upon their receipt therefor. Such agreement and receipt must be returned and filed with the clerk.

History.
C.C.P. 1881, § 525; R.S., R.C., & C.L., § 4598; C.S., § 7014; I.C.A., § 9-539.

RESEARCH REFERENCES

C.J.S. — 68 C.J.S., Partition, § 211.

6-540. Duty of recorder taking security or making investment. — The recorder in whose name a security is taken, or by whom an investment is made, and his successors in office, must receive the interest and principal as it becomes due, and apply and invest the same as the court may direct; and must deposit with the county treasurer all securities taken, and keep an account in a book provided and kept for that purpose in the recorder's office, free for inspection by all persons, of investments in moneys received by him thereon and the disposition thereof.

History.
C.C.P. 1881, § 526; R.S., R.C., & C.L., § 4599; C.S., § 7015; I.C.A., § 9-540.

RESEARCH REFERENCES

C.J.S. — 68 C.J.S., Partition, § 211.

6-541. Unequal partition — Compensation. — When it appears that partition cannot be made equal between the parties, according to their respective rights, without prejudice to the rights and interests of some of them, and a partition be ordered, the court may adjudge compensation to be made by one party to another on account of the inequality; but such compensation shall not be required to be made to others by owners

unknown, nor by an infant, unless it appears that such infant has personal property sufficient for that purpose, and that his interest will be promoted thereby. And in all cases the court has power to make compensatory adjustment between the respective parties according to the ordinary principles of equity.

History.
C.C.P. 1881, § 527; R.S., R.C., & C.L., § 4600; C.S., § 7016; I.C.A., § 9-541.

JUDICIAL DECISIONS

ANALYSIS

Award against minor.
Election to take.
Right to jury trial.

Award Against Minor.

Court may order or award compensation against minor only when it appears that such minor has personal property sufficient for that purpose. Wright v. Atwood, 33 Idaho 455, 195 P. 625 (1921).

A mortgage given by a guardian to secure payment by his ward of compensation awarded on account of inequality in the partition of property set off to said ward was void and the decree authorizing its execution may be collaterally attacked in an action to foreclose such mortgage. Wright v. Atwood, 33 Idaho 455, 195 P. 625 (1921).

Election to Take.

The filing of decree before expiration of time given defendants in partition suit as to which parcel of land they would elect to take was error, in the absence of a waiver of the time limit by defendants, even though there was no evidence that defendants were entitled to an election. Andrews v. Grover, 66 Idaho 742, 168 P.2d 821 (1946).

In partition suit where land was valued at $8,500.00 and house on one portion of land was worth $500.00, the court erred in its conclusion of law that the party electing to take that portion of the land with the house should pay the other party $500.00; the latter party would be required to pay only $250.00. Andrews v. Grover, 66 Idaho 742, 168 P.2d 821 (1946).

Right to Jury Trial.

Only procedure adapted to such trials is that provided by statutes for civil actions, and in such cases parties are not entitled to trial by jury. People ex rel. Brown v. Burnham, 35 Idaho 522, 207 P. 589 (1922).

Cited in: Troupis v. Summer, — Idaho —, 218 P.3d 1138 (2009).

RESEARCH REFERENCES

Am. Jur. — 59A Am. Jur. 2d, Partition, §§ 210 to 213.

C.J.S. — 68 C.J.S., Partition, § 132.

6-542. Sale of infant's share — Payment of proceeds to guardian. — When the share of an infant is sold, the proceeds of the sale may be paid by the referee making the sale to his general guardian, or the special guardian appointed for him in the action.

History.
C.C.P. 1881, § 528; R.S., R.C., & C.L., § 4601; C.S., § 7017; I.C.A., § 9-542; am. 1971, ch. 111, § 9, p. 233.

STATUTORY NOTES

Effective Dates.

Section 28 of S.L. 1971, ch. 111, as amended by S.L. 1971, ch. 126, § 2, provided that this section as amended should be in full force and effect on and after July 1, 1972.

6-543. Sale of share of insane [incapacitated or protected] person — Payment of proceeds to guardian. — The guardian who may be entitled to the custody and management of the estate of an incapacitated or protected person whose interest in real property has been sold, may receive, in behalf of such person, his share of the proceeds of such real property from the referees [by a judge of the court, that he will faithfully discharge the trust reposed in him, and will render a true and just account to the person entitled or to his legal representative].

History.
C.C.P. 1881, § 529; R.S., R.C., & C.L., § 4602; C.S., § 7018; I.C.A., § 9-543; am. 1971, ch. 111, § 10, p. 233.

STATUTORY NOTES

Compiler's Notes.
The bracketed insertion in the section heading was added by the compiler to reflect the changes made in the section text by the 1991 amendment.

The brackets around the language at the end of the section were added by the compiler to indicate that that language was probably intended to be struck by the 1991 amendment of the section.

Effective Dates.
Section 28 of S.L. 1971, ch. 111, as amended by S.L. 1971, ch. 126, § 2, provided that this section as amended should be in full force and effect on and after July 1, 1972.

6-544. Partition without action — Consent of guardian. — The general guardian of an infant, and the guardian entitled to the custody and management of the estate of an insane person, or other person adjudged incapable of conducting his own affairs, who is interested in the real estate held in joint tenancy, or in common, or in any other manner so as to authorize his being made a party to an action for the partition thereof, may consent to a partition without action, and agree upon the share to be set off to such infant or other person entitled, and may execute a release in his behalf to the owners of the shares of the parts to which they may be respectively entitled, upon an order of the court.

History.
C.C.P. 1881, § 530; R.S., R.C., & C.L., § 4603; C.S., § 7019; I.C.A., § 9-544.

RESEARCH REFERENCES

Am. Jur. — 59A Am. Jur. 2d, Partition, § 41.

6-545. Costs of partition — Apportionment to parties — Lien. — The costs of partition, including reasonable counsel fees, expended by the plaintiff or either of the defendants for the common benefit, fees of referees, and other disbursements, must be paid by the parties respectively entitled to share in the lands divided, in proportion to their respective interests therein, and may be included and specified in the judgment. In that case they shall be a lien on the several shares, and the judgment may be enforced by execution against such shares and against other property held by the respective parties. When, however, litigation arises between some of the parties only, the court may require the expense of such litigation to be paid

by the parties thereto, or any of them.

History.
C.C.P. 1881, § 531; R.S., R.C., & C.L., § 4604; C.S., § 7020; I.C.A., § 9-545.

RESEARCH REFERENCES

Am. Jur. — 59A Am. Jur. 2d, Partition, §§ 149, 180 to 204.
C.J.S. — 68 C.J.S., Partition, § 220 et seq.
A.L.R. — Excessiveness or adequacy of attorneys' fees in matters involving real estate — modern cases. 10 A.L.R.5th 448.

6-546. Appointment of single referee. — The court, with the consent of the parties, may appoint a single referee, instead of three (3) referees, in the proceedings under the provisions of this chapter, and the single referee, when thus appointed, has all the powers and may perform all the duties required of the three (3) referees.

History.
C.C.P. 1881, § 532; R.S., R.C., & C.L., § 4605; C.S., § 7021; I.C.A., § 9-546.

6-547. Cost of abstract of title. — If it appears to the court that it was necessary to have made an abstract of the title to the property to be partitioned, and such abstract shall have been procured by the plaintiff, or if the plaintiff shall have failed to have the same made before the commencement of the action, and any one of the defendants shall have had such abstract afterwards made, the cost of the abstract, with interest thereon from the time the same is subject to inspection of the respective parties to the action, must be allowed and taxed.

History.
C.C.P. 1881, § 533; R.S., R.C., & C.L., § 4606; C.S., § 7022; I.C.A., § 9-547.

CHAPTER 6

USURPATION OF OFFICE OR FRANCHISE

SECTION.

6-601. Writ of scire facias abolished. — The writ of scire facias is abolished.

History.
C.C.P. 1881, § 534; R.S., R.C., & C.L., § 4611; C.S., § 7023; I.C.A., § 9-601.

STATUTORY NOTES

Cross References.
Election contests § 34-2001 et seq.; legislative and state executive offices, § 34-2101 et seq.
Recall elections, § 34-1701 et seq.
Substitute for writ of scire facias, § 11-105.

JUDICIAL DECISIONS

Construction of Statute.
Scire facias is abolished but the functions of the writ are served by the provisions of §§ 11-105, 11-312, to which the rules governing the writ apply; the revivor suit is not a new action but merely a proceeding in aid of execution. Evans v. City of Am. Falls, 52 Idaho 7, 11 P.2d 363 (1932); Gertztowt v. Humphrey, 53 Idaho 631, 27 P.2d 64 (1933).

Cited in: Stevens v. Hall, 8 Idaho 549, 69 P. 282 (1902); Bashor v. Beloit, 20 Idaho 592, 119 P. 55 (1911); People ex rel. Brown v. Burnham, 35 Idaho 522, 207 P. 589 (1922); State ex rel. Taylor v. Beneficial Protective Ass'n, 60 Idaho 87, 94 P.2d 787 (1939).

RESEARCH REFERENCES

C.J.S. — 79 C.J.S., Scire Facias, § 1 et seq.

6-602. Actions for usurpation of office. — An action may be brought in the name of the people of the state against any person who usurps, intrudes into, holds or exercises any office or franchise, real or pretended, within this state, without authority of law. Such action shall be brought by the prosecuting attorney of the proper county, when the office or franchise relates to a county, precinct or city, and when such office or franchise relates to the state, by the attorney general; and it shall be the duty of the proper officer, upon proper showing, to bring such action whenever he has reason to believe that any such office or franchise has been usurped, intruded into, held or exercised without authority of law. Any person rightfully entitled to an office or franchise may bring an action in his own name against the person who has usurped, intruded into, or who holds or exercises the same.

History.
R.S., R.C., & C.L., § 4612; C.S., § 7024; I.C.A., § 9-602.

JUDICIAL DECISIONS

Analysis

Burden of Proof.
In action to oust incumbent and induct elected successor into office, burden is on latter to establish his right to office and to produce evidence to sustain such burden. Whitten v. Chapman, 45 Idaho 653, 264 P. 871 (1928).

Construction of Statute.
This section supplants the common law writ of quo warranto; it is no longer necessary

to file an application for leave to sue nor give defendant opportunity to show cause why proceedings be not commenced. State ex rel. Taylor v. Beneficial Protective Ass'n, 60 Idaho 587, 94 P.2d 787 (1939).

Because there exists a statutory mechanism for removing judges, there is no basis to invoke the superseded common law writ of quo warranto. Parsons v. Beebe, 116 Idaho 551, 777 P.2d 1224 (Ct. App. 1989).

Evidence.

It was reversible error not to admit in evidence ballots, ballot boxes, ballot box keys and election returns offered in evidence by appellant where there was nothing to indicate such evidence was not substantially in the same condition as at the time of the election, such evidence having been rejected by the court on the ground that it was not admissible in a quo warranto proceeding to try title to an office, only being admissible in an election contest. Tiegs v. Patterson, 81 Idaho 46, 336 P.2d 687 (1959).

Nature of Proceeding.

Proceeding in quo warranto is not a civil action but a quasi criminal proceeding; therefore, there can be no intervention in such proceeding. People v. Green, 1 Idaho 235 (1869).

Action of quo warranto to try title to an office is an action at law, and territorial statute authorizing such action to be determined at chambers without intervention of jury was in violation of the federal constitution. People ex rel. Gorman v. Havird, 2 Idaho 531, 25 P. 294 (1889).

One remedy for reaching the ineligibility of person to hold office is by information in nature of quo warranto; the other is by a contest under express provisions of the statute. Toncray v. Budge, 14 Idaho 621, 95 P. 26 (1908).

Writ of quo warranto was a common-law remedy and is now a statutory remedy in this state, being covered by and included in this section and the following sections; district courts of this state have original jurisdiction in proceedings by information in the nature of quo warranto, and the jurisdiction to be exercised falls within the category of cases both at law and in equity. Toncray v. Budge, 14 Idaho 621, 95 P. 26 (1908).

Remedy herein provided for an information in the nature of quo warranto is for protection of the public in its governmental and sovereign capacity, and for benefit of the community or state at large rather than for gratification, satisfaction, or protection of any particular individual, except it be one who is himself entitled to office. Toncray v. Budge, 14 Idaho 621, 95 P. 26 (1908).

Statutory proceedings for removal from office are in the nature of quo warranto and quasi criminal. State v. Gooding, 22 Idaho 128, 124 P. 791 (1912).

This is not quo warranto proceeding at common law; it is usually called proceeding in nature of quo warranto notwithstanding abolition of such proceedings by territorial legislature. People ex rel. Brown v. Burnham, 35 Idaho 522, 207 P. 589 (1922).

It was unnecessary that attorney-general file application to bring quo warranto proceeding to inquire into the authority by which a benefit association exercised its franchise, or that he give the association opportunity to show cause why proceeding should not be commenced, since the common-law proceeding by information in the nature of quo warranto has been abolished in Idaho. State ex rel. Taylor v. Beneficial Protective Ass'n, 60 Idaho 587, 94 P.2d 787 (1939).

No Jury Trial.

Defendant is not entitled to determination of his right to the office by a jury. People ex rel. Brown v. Burnham, 35 Idaho 522, 207 P. 589 (1922).

Subject-Matter of Review.

Irregularities in action of the board of county commissioners in establishing a justice precinct cannot be reviewed in action of quo warranto to try title to office of justice in such precinct. Johnston v. Savidge, 11 Idaho 204, 81 P. 616 (1905).

Time for Commencement of Action.

The election contest statute requires an action thereunder to be commenced within twenty days after the votes are canvassed whereas the usurpation of office statute does not have this limitation of time for the commencement of the action. Tiegs v. Patterson, 79 Idaho 365, 318 P.2d 588 (1957).

Where appellant who alleged in his complaint that he had received a majority of the votes cast in an election to choose a director from division of irrigation district, both appellee and appellant having been nominated for such office and their names appearing on the ballot, has brought the action under the usurpation statute and has not in anywise contested the election, the filing of such action later than the twenty (20) day period provided for contesting an election would not be controlling as such limitation period was provided in the election contest statute, even though the secretary of the district had issued a certificate of election. Tiegs v. Patterson, 79 Idaho 365, 318 P.2d 588 (1957).

Who May Prosecute.

It is contrary to the spirit and purpose of the ancient writ of quo warranto, and its modern form of information in the nature of quo warranto, to allow action to be prosecuted promiscuously by any and every elector. Ac-

tion must be prosecuted in the name of the people of the state against the usurper or intruder and must be brought by or on relation of the district attorney of the proper county or of the attorney-general, except in the single instance where person claims himself to be originally entitled to office, when he may prosecute the action in his own name. Toncray v. Budge, 14 Idaho 621, 95 P. 26 (1908).

If action in nature of quo warranto is not prosecuted by or on relation of the attorney-general or the proper county attorney, it is necessary for plaintiff to show some good cause why the same is not so prosecuted and to obtain permission and consent of court to act as relator himself and prosecute the action. Toncray v. Budge, 14 Idaho 621, 95 P. 26 (1908).

Where a village located in one county passed an ordinance annexing territory in another county, the prosecuting attorney of the county in which the land sought to be annexed was located, who filed an action for a declaratory judgment to determine validity of ordinance was entitled to maintain same as a quo warranto proceeding, though quo warranto was not the exclusive remedy for testing validity of annexation. Potvin v. Chubbuck, 76 Idaho 453, 284 P.2d 414 (1955).

Cited in: State ex rel. Holcomb v. Inhabitants of Pocatello, 3 Idaho 174, 28 P. 411 (1891); Gowey v. Siggelkow, 85 Idaho 574, 382 P.2d 764 (1963); Clark v. Ada County Bd. of Comm'rs, 98 Idaho 749, 572 P.2d 501 (1977); State ex rel. Roark v. City of Hailey, 102 Idaho 511, 633 P.2d 576 (1981).

RESEARCH REFERENCES

Am. Jur. — 63C Am. Jur. 2d, Public Officers and Employees, §§ 147 to 151.
65 Am. Jur. 2d, Quo Warranto, § 1 et seq.
C.J.S. — 67 C.J.S., Officers and Public Employees, §§ 113 to 115.
74 C.J.S., Quo Warranto, § 1 et seq.
A.L.R. — Validity, construction, and effect of state franchising statute. 67 A.L.R.3d 1299.

6-603. Statement of private right — Arrest of defendant. — Whenever such action is brought in the name of the people of the state, the prosecuting attorney at the request of the person entitled to the office or franchise, in addition to the cause of action in behalf of the people of the state, may set forth the name of the person so entitled, with a statement of his right thereto, and in such case, upon proof by affidavit that the defendant has received fees or emoluments belonging to the office, and by means of usurpation thereof, an order may be granted by the judge or court wherein the case is pending, for the arrest of such defendant, and holding him to bail, and thereupon he may be arrested and held to bail in the same manner and with the same effect, and subject to the same rights and liabilities as in other civil actions where the defendant is subject to arrest.

History.
C.C.P. 1881, § 536; R.S., R.C., & C.L., § 4613; C.S., § 7025; I.C.A., § 9-603.

STATUTORY NOTES

Cross References.
Arrest in civil cases, § 8-101 et seq.

JUDICIAL DECISIONS

Cited in: People ex rel. Brown v. Burnham, 35 Idaho 522, 207 P. 589 (1922).

6-604. Form of judgment. — In every such case judgment may be rendered upon the right of the defendant, and also upon the right of the

party so alleged to be entitled, or only upon the right of the defendant, as the form of the action and justice may require.

History.
C.C.P. 1881, § 537; R.S., R.C., & C.L., § 4614; C.S., § 7026; I.C.A., § 9-604.

JUDICIAL DECISIONS

Cited in: People ex rel. Brown v. Burnham, 35 Idaho 522, 207 P. 589 (1922).

RESEARCH REFERENCES

Am. Jur. — 65 Am. Jur. 2d, Quo Warranto, §§ 130 to 140.

C.J.S. — 74 C.J.S., Quo Warranto, §§ 84 to 88.

6-605. Judgment for person entitled to office. — If the judgment be rendered upon the right of the person so alleged to be entitled, and the same be in favor of such person, he shall be entitled, after taking the oath of office and executing such official bond as may be required by law, to take upon himself the execution of the office.

History.
C.C.P. 1881, § 538; R.S., R.C., & C.L., § 4615; C.S., § 7027; I.C.A., § 9-605.

RESEARCH REFERENCES

Am. Jur. — 65 Am. Jur. 2d, Quo Warranto, § 138.

C.J.S. — 74 C.J.S., Quo Warranto, §§ 86, 87.

6-606. Damages against usurper. — If judgment be rendered upon the right of the person so alleged to be entitled, in favor of such person, he may recover by action the damages which he may have sustained by reason of the usurpation of the office by the defendant.

History.
C.C.P. 1881, § 539; R.S., R.C., & C.L., § 4616; C.S., § 7028; I.C.A., § 9-606.

JUDICIAL DECISIONS

Executive Immunity.

An action against the governor for damages resulting from usurpation of office of county commissioner was properly dismissed on the basis of executive immunity where he appointed a county commissioner to replace the previously appointed commissioner who was filling vacancy left by the death of reelected incumbent. Bone v. Andrus, 96 Idaho 291, 527 P.2d 783 (1974).

RESEARCH REFERENCES

Am. Jur. — 65 Am. Jur. 2d, Quo Warranto, § 135.

C.J.S. — 67 C.J.S., Officers and Public Employees, § 113.
74 C.J.S., Quo Warranto, §§ 86, 87.

6-607. Actions against several claimants. — When several persons claim to be entitled to the same office or franchise, one action may be brought against all such persons in order to try their respective rights to such office or franchise.

History.
C.C.P. 1881, § 540; R.S., R.C., & C.L., § 4617; C.S., § 7029; I.C.A., § 9-607.

JUDICIAL DECISIONS

Cited in: People ex rel. Brown v. Burnham, 35 Idaho 522, 207 P. 589 (1922).

RESEARCH REFERENCES

Am. Jur. — 65 Am. Jur. 2d, Quo Warranto, § 98.

C.J.S. — 74 C.J.S., Quo Warranto, § 58.

6-608. Judgment of ouster — Fine. — When a defendant against whom such action has been brought is adjudged guilty of usurping or intruding into or unlawfully holding any office, franchise or privilege, judgment must be rendered that such defendant be excluded from the office, franchise or privilege, and that he pay the costs of the action. The court may also, in its discretion, in actions to which the people of the state are a party, impose upon the defendant a fine not exceeding five thousand dollars, which fine, when collected, must be paid into the treasury of the state.

History.
C.C.P. 1881, § 541; R.S., R.C., & C.L., § 4618; C.S., § 7030; I.C.A., § 9-608.

JUDICIAL DECISIONS

Cited in: People ex rel. Gorman v. Havird, 2 Idaho 531, 25 P. 294 (1889); People ex rel. Brown v. Burnham, 35 Idaho 522, 207 P. 589 (1922).

RESEARCH REFERENCES

Am. Jur. — 65 Am. Jur. 2d, Quo Warranto, §§ 134, 136.

C.J.S. — 67 C.J.S., Officers and Public Employees, §§ 113 to 115.
74 C.J.S., Quo Warranto, §§ 84, 86, 87.

6-609. Undertaking required of informer. — When the action is brought upon the information or application of a private party, the prosecuting attorney may require such party to enter into an undertaking, with sureties to be approved by the said officer, conditioned that such party or the sureties will pay any judgment for costs or damages recovered against the plaintiff, and all the costs and expenses incurred in the prosecution of the action.

History.
C.C.P. 1881, § 542; R.S., R.C., & C.L., § 4619; C.S., § 7031; I.C.A., § 9-609.

STATUTORY NOTES

Cross References.

Abatement of moral nuisances, bond, § 52-402.

Adjudication of water rights, filing fee, § 42-1414.

Justification of sureties, § 12-614.

State, county or city need not give bond, § 12-615.

Statutory form of undertaking, § 12-613.

JUDICIAL DECISIONS

Amended Complaint.

Where county was notified of a claim on February 7, 1989, and suit was filed against it on March 7, 1989, an amendment of the complaint on May 21, 1990, adding a claim under the Tort Claims Act, will not be dismissed as making the original complaint prematurely filed in that the complaint was filed less than 90 days after notice of a claim was given to the county. Farnworth v. Femling, 125 Idaho 283, 869 P.2d 1378, cert. denied, 513 U.S. 816, 115 S. Ct. 73, 130 L. Ed. 2d 28 (1994).

Cited in: Toncray v. Budge, 14 Idaho 621, 95 P. 26 (1908).

RESEARCH REFERENCES

Am. Jur. — 65 Am. Jur. 2d, Quo Warranto, § 59.

C.J.S. — 74 C.J.S., Quo Warranto, § 85.

6-610. Actions against law enforcement officers. — (1) For purposes of this section, a "law enforcement officer" shall be defined as any court personnel, sheriff, constable, peace officer, state police officer, correctional, probation or parole official, prosecuting attorney, city attorney, attorney general, or their employees or agents, or any other person charged with the duty of enforcement of the criminal, traffic or penal laws of this state or any other law enforcement personnel or peace officer as defined in chapter 51, title 19, Idaho Code.

(2) Before any civil action may be filed against any law enforcement officer or service of civil process on any law enforcement officer, when such action arises out of, or in the course of the performance of his duty, or in any action upon the bond of any such law enforcement officer, the proposed plaintiff or petitioner, as a condition precedent thereto, shall prepare and file with, and at the time of filing the complaint or petition in any such action, a written undertaking with at least two (2) sufficient sureties in an amount to be fixed by the court. The purpose of this requirement is to ensure diligent prosecution of a civil action brought against a law enforcement officer, and in the event judgment is entered against the plaintiff or petitioner, for the payment to the defendant or respondent of all costs and expenses that may be awarded against the plaintiff or petitioner, including an award of reasonable attorney's fees as determined by the court.

(3) In any such civil action the prevailing party shall be entitled to an award of costs as otherwise provided by law. The official bond of any law enforcement officer under this section shall be liable for any such costs.

(4) At any time during the course of a civil action against a law enforcement officer, the defendant or respondent may except to either the plaintiff's or petitioner's failure to file a bond or to the sufficiency of the sureties or to the amount of the bond.

(5) When the defendant or respondent excepts to the plaintiff's or petitioner's failure to post a bond under this section, the judge shall dismiss the case.

(6) When the defendant or respondent excepts to the sufficiency of the sureties[,] the sureties must be justified by the plaintiff or petitioner. Upon failure to justify the judge must dismiss the case.

(7) When the amount of the bond is excepted to, a hearing may be held upon notice to the plaintiff or petitioner by the defendant or respondent of not less than two (2) nor more than ten (10) working days after the date the exception is filed, before the judge of the court in which the action is brought. If it appears that the bond is insufficient in amount, the judge shall order a new bond sufficient in amount to be filed within five (5) days of the date such order is received by the plaintiff or petitioner. If no such bond is filed as required by the order of the court, the judge shall dismiss the action.

History.
I.C., § 6-610, as added by 1953, ch. 234, § 1, p. 351; am. 1955, ch. 78, § 1, p. 150; am. 1997, ch. 131, § 1, p. 398.

STATUTORY NOTES

Compiler's Notes.
The bracketed comma in subsection (6) was inserted by the compiler.

JUDICIAL DECISIONS

Analysis

Actions against police officers.
Amended complaint.
Actions against state.
Bond for costs.
Free exercise of religion.
Necessity for compliance with statute.
Purpose of section.
Tort claim actions.
Written undertaking.

Actions Against Police Officers.
Where the complaint alleged defendants, at the time acts complained of, were acting as police officers, court was required to assume, for the purpose of determining the applicability of this statute, that the action arose out of and in the course of the performance of the duties of the officers. Monson v. Boyd, 81 Idaho 575, 348 P.2d 93 (1959).

Amended Complaint.
Where county was notified of a claim on February 7, 1989, and suit was filed against it on March 7, 1989, an amendment of the complaint on May 21, 1990, adding a claim under the Tort Claims Act, will not be dismissed as making the original complaint prematurely filed in that the complaint was filed less than 90 days after notice of a claim was given to the county. Farnworth v. Femling, 125 Idaho 283, 869 P.2d 1378, cert. denied, 513 U.S. 816, 115 S. Ct. 73, 130 L. Ed. 2d 28 (1994).

Actions Against State.
Assuming, but not deciding, that the act authorized the commissioner to procure public liability insurance, in the absence of any language expressing a waiver of immunity, the procuring of such insurance would not be sufficient to authorize an action against the state for the negligence of a police officer. Pigg v. Brockman, 79 Idaho 233, 314 P.2d 609 (1957), rev'd on other grounds, 85 Idaho 492, 381 P.2d 286 (1963).

Bond for Costs.
The requirement of this section that plaintiff file an undertaking for costs is not jurisdictional and while the undertaking may be weighed by the defendant the statute is mandatory, so that where it is not complied with,

the district court must dismiss the action when appropriate objection is timely urged by the defendant officer. Pigg v. Brockman, 79 Idaho 233, 314 P.2d 609 (1957), rev'd on other grounds, 85 Idaho 492, 381 P.2d 286 (1963).

In view of the mandatory nature of the act directing public liability insurance on state vehicles, the issue of want of undertaking for costs was properly raised by a motion to strike rather than by demurrer for want of capacity to sue. Pigg v. Brockman, 79 Idaho 233, 314 P.2d 609 (1957), rev'd on other grounds, 85 Idaho 492, 381 P.2d 286 (1963).

Defense of lack of bond as required by this section was waived when not asserted in responsive pleading. Garren v. Butigan, 95 Idaho 355, 509 P.2d 340 (1973).

In a claim under the Idaho Tort Claims Act, § 6-901 et seq., the district court properly dismissed the complaint against an Idaho deputy and a Utah sheriff, both of whom had been involved in an automobile pursuit, because the plaintiff did not pay the bond required by this section in a civil suit against law enforcement officers in the scope or performance of their duties and he did not seek relief, as an indigent, from the bond requirement under § 31-3220. Athay v. Stacey, 146 Idaho 407, 196 P.3d 325 (2008).

A plaintiff who is indigent may request a waiver from the bond requirement in this section. Frost v. Robertson, 2009 U.S. Dist. LEXIS 24006 (D. Idaho 2009).

Free Exercise of Religion.

Requirement to post a security bond as a condition precedent to filing a civil action against a law enforcement officer did not apply to indigent prisoner seeking writ of habeas corpus for violation of his free exercise of religion. Hyde v. Fisher, 143 Idaho 782, 152 P.3d 653 (Ct. App. 2007).

Necessity for Compliance With Statute.

Where the complaint shows on its face, or where it is made to appear by evidence in support of a motion to dismiss, that the action is against peace officers and arises out of or in the course of the performance of the duty of such officers, if this statute has not been complied with, the action must be dismissed. Monson v. Boyd, 81 Idaho 575, 348 P.2d 93 (1959).

Purpose of Section.

The public object sought to be accomplished by this section is within the police power of the state and the limitation upon the rights of plaintiffs having causes of action against police officers is reasonable, that of securing an undertaking for costs; the act has a direct tendency to accomplish the legislative purpose and is not unconstitutional upon any ground urged. Pigg v. Brockman, 79 Idaho 233, 314 P.2d 609 (1957), rev'd on other grounds, 85 Idaho 492, 381 P.2d 286 (1963).

Tort Claim Actions.

Section 34-2020 and this section have been displaced in tort claim actions by the clear language of § 6-918A; both of them antedate § 6-918A and neither of them has ever contained express and specific language establishing an exception to the exclusive scope of § 6-918A. Kent v. Pence, 116 Idaho 22, 773 P.2d 290 (Ct. App. 1989) (But see Beehler v. Fremont County, 145 Idaho 656, 182 P.3d 713 (Ct. App. 2008)).

Written Undertaking.

Action by taxpayer against the state tax commission and sheriff for trespassing upon his land and unlawfully seizing his property where plaintiff failed to post bond must be dismissed. Greenwade v. Idaho State Tax Comm'n, 119 Idaho 501, 808 P.2d 420 (Ct. App. 1991).

The requirement of this section that a prospective plaintiff in a suit against a law enforcement officer file an undertaking for costs is not jurisdictional and may be waived by the defendant; however, it is mandatory, and where it is not complied with, the district court must dismiss the action when the appropriate objection is timely urged by the defendant. Greenwade v. Idaho State Tax Comm'n, 119 Idaho 501, 808 P.2d 420 (Ct. App. 1991).

Trial court properly dismissed the negligence complaint for failure to file a written undertaking. This section was not superseded by the Idaho tort claims act, § 6-901 et seq., and applies to all suits against law enforcement officers whether they are brought in tort or as other civil claims. Beehler v. Fremont County, 145 Idaho 656, 182 P.3d 713 (Ct. App. 2008).

Cited in: Rogers v. State, 98 Idaho 742, 572 P.2d 176 (1977).

RESEARCH REFERENCES

Am. Jur. — 65 Am. Jur. 2d, Quo Warranto, §§ 32, 37.

C.J.S. — 74 C.J.S., Quo Warranto, §§ 16 to 20.

6-610A. Employer furnishing defense for public officer in criminal actions — Requirements. — (1) If a criminal action or proceeding is

brought against an employee who is a sheriff, constable, peace officer, commissioned officer of the Idaho state police, or any other person charged with the duty of enforcement of the criminal laws of this state, the employer of the employee charged in the criminal action shall reimburse the employee for reasonable expenses the employee incurred in providing his defense in the criminal action if:

(a) The criminal action or proceeding is brought on account of an act or omission which occurred in the course and scope of the employee's duties as an employee of the employer; and

(b) The employee provides his own defense in the criminal action and the employee is found not guilty of the criminal charges or the charges are dropped.

(2) For the purposes of this section, employer shall mean the state of Idaho or any office, department, agency, authority, commission, board or other instrumentality thereof, and political subdivisions of the state of Idaho including any city, county or municipal corporation.

History.
I.C., § 6-610A, as added by 1987, ch. 175, § 1, p. 348; am. 1995, ch. 116, § 21, p. 386; am. 2000, ch. 469, § 16, p. 1450.

STATUTORY NOTES

Effective Dates.
Section 30 of S.L. 1995, ch. 116 declared an emergency. Approved March 14, 1995.

6-611. Immunity from liability. — No public officer may be held either criminally or civilly liable for actions performed under any statute if such statute is subsequently declared by judicial determination to be unconstitutional or otherwise non-existent or void, if such actions would have been legal had such statute not been held by judicial determination to be unconstitutional or otherwise non-existent or void.

History.
I.C., § 6-611, as added by 1959, ch. 5, § 1, p. 12.

JUDICIAL DECISIONS

Liability in Official Capacity.
Judgment for plaintiff in an action against the former state tax collector and the acting tax collector for refund of taxes paid by plaintiff under protest as to the validity of the taxing statute is against the defendants in their official capacity and not as individuals. American Oil Co. v. Neill, 90 Idaho 333, 414 P.2d 206 (1966), overruled on other grounds, County of Ada v. Red Steer Drive-Ins of Nev., Inc., 101 Idaho 94, 609 P.2d 161 (1980).

CHAPTER 7

LIBEL AND SLANDER

6-701. Defamatory statements uttered on radio and television broadcasts in behalf of candidates — Liability. — The owner, licensee, or operator of a visual or sound radio broadcasting station, or network of stations, or agents or employees of any such owner, licensee, or operator shall not be liable for any damages for any defamatory statement published or uttered in or as a part of any visual or sound radio broadcast by or on behalf of any candidate for public office; Provided, however, that this exemption from liability shall not apply to any owner, licensee, or operator, or agent or employee of any owner, licensee, or operator of such visual or sound radio broadcasting station, or network of stations, when such owner, licensee, or operator, or agent or employee of the owner, licensee, or operator of such visual or sound radio broadcasting station is a candidate for public office or speaking on behalf of a candidate for public office.

History.
1953, ch. 29, § 1, p. 49.

RESEARCH REFERENCES

Am. Jur. — 50 Am. Jur. 2d, Libel and Slander, § 353.
A.L.R. — Libel and slander: statements regarding labor relations or disputes. 94 A.L.R.5th 149.

6-702. Uniform single publication act — One cause of action for libel or slander — Recovery. — No person shall have more than one (1) cause of action for damages for libel or slander or invasion of privacy or any other tort founded upon any single publication or exhibition or utterance, such as any one (1) edition of a newspaper or book or magazine or any one (1) presentation to an audience or any one (1) broadcast over radio or television or any one (1) exhibition of a motion picture. Recovery in any action shall include all damages for any such tort suffered by the plaintiff in all jurisdictions.

History.
1953, ch. 109, § 1, p. 143.

STATUTORY NOTES

Cross References.
Criminal actions for libel, § 18-4801 et seq.
Defamation of insurer, § 41-1308.
Determination of law and fact by jury in libel cases, § 19-2130.
False reports about cooperative marketing associations, § 22-2624.
Indictment for libel, § 19-1424.
Jury verdict in libel trial, § 19-2304.

RESEARCH REFERENCES

Am. Jur. — 50 Am. Jur. 2d, Libel and Slander, §§ 245 to 247.
C.J.S. — 53 C.J.S., Libel and Slander, §§ 97, 98.
A.L.R. — False news reports as to births, betrothals, marriages, divorces or similar marital matters. 9 A.L.R.3d 559.
Venue of civil libel action against newspaper or periodical. 15 A.L.R.3d 1249.
Qualified privilege of reply to defamatory publication. 41 A.L.R.3d 1083.
What constitutes "publication" of libel in order to start running of period of limitations. 42 A.L.R.3d 807.
Defamation by radio or television. 50 A.L.R.3d 1311.
Invasion of privacy by radio or television. 56 A.L.R.3d 386.
Publication of address as well as name of person as invasion of privacy. 84 A.L.R.3d 1159.
Invasion of privacy by use of a picture of plaintiff's property for advertising purposes. 87 A.L.R.3d 1279.
Defamation of class or group as actionable by individual member. 52 A.L.R.4th 618.
Libel or slander: defamation by statement made in jest. 57 A.L.R.4th 520.

6-703. Judgment a bar to second action. — A judgment in any jurisdiction for or against the plaintiff upon the substantive merits of any action for damages founded upon a single publication or exhibition or utterance as described in section 6-702[, Idaho Code,] shall bar any other action for damages by the same plaintiff against the same defendant founded upon the same publication or exhibition or utterance.

History.
1953, ch. 109, § 2, p. 143.

STATUTORY NOTES

Compiler's Notes.
The bracketed insertion was added by the compiler to conform to the statutory citation style.

6-704. Interpretation of act. — This act shall be so interpreted as to effectuate its purpose to make uniform the law of those states or jurisdictions which enact it.

History.
1953, ch. 109, § 3, p. 143.

STATUTORY NOTES

Compiler's Notes.
The words "this act" refer to S.L. 1953, ch. 109, which is compiled herein as §§ 6-702 to 6-705.

6-705. Title of act. — This act may be cited as the Uniform Single Publication Act.

History.
1953, ch. 109, § 4, p. 143.

STATUTORY NOTES

Compiler's Notes.
The words "this act" refer to S.L. 1953, ch. 109, which is compiled herein as §§ 6-702 to 6-705.

Effective Dates.
Section 5 of S.L. 1953, ch. 109 provided that the act should not be retroactive as to causes of action existing on its effective date.

6-706. Radio or television broadcasting station or network of stations — Proof of malice. — No person, firm, or corporation owning or operating a radio or television broadcasting station or network of stations shall be liable under the laws of libel, slander or defamation on account of having made its broadcasting facilities or network available to any person, in the absence of proof of actual malice on the part of such owner or operator; Provided, however, that this section shall not be construed to amend or modify the provisions of section 6-701, Idaho Code.

History.
1963, ch. 158, § 1, p. 459.

RESEARCH REFERENCES

Am. Jur. — 50 Am. Jur. 2d, Libel and Slander, § 353.
A.L.R. — Liability of internet service provider for internet or e-mail defamation. 84 A.L.R.5th 169.

6-707. Right of station to require submission of matter intended to be broadcast. — Any person, firm, or corporation owning or operating a radio or television broadcasting station shall have the right, but shall not be compelled, to require the submission and permanent filing, in such station, of a copy of the complete address, script or other form of expression, intended to be broadcast over such station before the time of the intended broadcast thereof.

History.
1963, ch. 158, § 2, p. 459.

RESEARCH REFERENCES

Am. Jur. — 50 Am. Jur. 2d, Libel and Slander, § 353.

6-708. Limitations and restrictions upon immunity from liability — Failure to exercise due care. — Nothing in this act contained shall be construed to relieve any person broadcasting over a radio or television station from liability under the law of libel, slander or defamation. Nor shall anything in this act be construed to relieve any person, firm, or corporation owning or operating a radio or television broadcasting station or network

from liability under the law of libel, slander or defamation on account of any broadcast prepared or made by any such person, firm, or corporation or by any officer or employee thereof in the course of his employment. In no event, however, shall any such person, firm, or corporation be liable for any damages for any defamatory statement or act published or uttered on or as a part of a visual or sound broadcast unless it shall be alleged and proved by the complaining party that such person, firm, or corporation has failed to exercise due care to prevent the publication or utterance of such statement or act in such broadcast. Bona fide compliance with any federal law or the regulation of any federal regulatory agency shall be deemed to constitute such due care as hereinabove mentioned.

History.
1963, ch. 158, § 3, p. 459.

STATUTORY NOTES

Compiler's Notes.
The words "this act" refer to S.L. 1963, ch. 158, which is compiled as §§ 6-706 to 6-714.

6-709. Liability in case of joint operation. — In any case where liability shall exist on account of any broadcast where two (2) or more radio or television stations were connected together simultaneously or by transcription, film, or other approved or adapted use for joint operation, in the making of such broadcast, such liability shall be confined and limited solely to the person, firm, or corporation owning or operating the radio or television station which originated such broadcast.

History.
1963, ch. 158, § 4, p. 459.

6-710. Privileged broadcasts. — A privileged broadcast which shall not be considered as libelous, slanderous, or defamatory is one made:

(1) In the proper discharge of an official duty.

(2) In any broadcast of or any statement made in any legislative or judicial proceeding.

(3) By fair and true report, without malice of a judicial, legislative, or other public official proceedings, or of anything said in the course thereof, or of a charge or complaint made by any person to a public official, upon which a warrant shall have been issued or an arrest made.

History.
1963, ch. 158, § 5, p. 459.

RESEARCH REFERENCES

Am. Jur. — 50 Am. Jur. 2d, Libel and Slander, § 255 et seq.

C.J.S. — 53 C.J.S., Libel and Slander, § 104 et seq.

A.L.R. — Application of privilege attending statements made in course of judicial proceedings to pretrial deposition and discovery procedures. 23 A.L.R.3d 1172.

Out-of-court communications between attorneys made preparatory to, or in the course

of or aftermath of, civil judicial proceedings as privileged. 36 A.L.R.3d 1328.

Relevancy of matter contained in pleading as affecting privilege within law of libel. 38 A.L.R.3d 272.

Privilege of reporting judicial proceedings as extending to proceeding held in secret or as to which record is sealed by court. 43 A.L.R.3d 634.

Employer's privilege as to communications to news media concerning employees. 52 A.L.R.3d 739.

Privileged nature of statements or utterances by member of school board in course of official proceedings. 85 A.L.R.3d 1137.

6-711. Malice not inferred from broadcast. — In the cases provided for in subdivision (3) of the preceding section, malice is not to be inferred from the mere fact of communication or broadcast.

History.
1963, ch. 158, § 6, p. 459.

RESEARCH REFERENCES

Am. Jur. — 50 Am. Jur. 2d, Libel and Slander, §§ 4, 5, 26, 32.

C.J.S. — 53 C.J.S., Libel and Slander, §§ 83 to 85.

6-712. Retraction by newspaper, radio or television broadcasting station or network of stations — Limit of recovery. — In any action for damages for the publication of a libel, in a newspaper, or of a slander or libel by radio or television broadcast, plaintiff shall recover no more than actual damages unless a correction be demanded and be not published or broadcast, as hereinafter provided. Plaintiff shall serve upon the publisher, at the place of publication or broadcaster at the place of broadcast, a written notice specifying the statements and the manner in which said statements are claimed to be slanderous or libelous and demanding that the same be corrected. Said notice and demand must be served within 20 days after knowledge of the publication or broadcast of the statement claimed to be slanderous or libelous. If a correction be demanded within said period and be not published or broadcast in substantially as conspicuous a manner in said newspaper or on said radio or television broadcasting station as were the statements claimed to be slanderous or libelous, in a regular issue thereof published or broadcast within three (3) weeks after such service, plaintiff, if he proves such notice, demand and failure to correct, and if his cause of action be maintained, may recover general, actual and exemplary damages; provided that no exemplary damages may be recovered unless the plaintiff shall prove that defendant made the publication or broadcast with actual malice, and actual malice shall not be inferred or presumed from the publication or broadcast. A correction published or broadcast in substantially as conspicuous a manner in said newspaper or on said broadcasting station as the statements claimed in the complaint to be defamatory, prior to receipt of a demand therefor, shall be of the same force and effect as though such correction has been published or broadcast within three (3) weeks after a demand therefor.

History.
1963, ch. 158, § 7, p. 459.

RESEARCH REFERENCES

Am. Jur. — 50 Am. Jur. 2d, Libel and Slander, § 325 et seq.

C.J.S. — 53 C.J.S., Libel and Slander, § 183.

A.L.R. — Who is protected by statute restricting recovery unless retraction is demanded. 84 A.L.R.3d 1249.

6-713. Privileged publication in newspaper defined. — A privileged publication in a newspaper which shall not be considered as libelous is one made:

(1) In the proper discharge of an official duty.

(2) In any publication of or any statement made in any legislative or judicial proceeding.

(3) In a communication, without malice, to a person interested therein, by one who is also interested, or by one who stands in such relation to the person interested as to afford a reasonable ground for supposing the motive for the communication innocent, or who is requested by the person interested to give the information.

(4) By a fair and true report, without malice, of a judicial, legislative or other public official proceeding, or of anything said in the course thereof, or of a charge or complaint made by any person to a public official, upon which a warrant shall have been issued or an arrest made.

History.
1963, ch. 158, § 8, p. 459.

JUDICIAL DECISIONS

Private Statements of Police Officers.
Regardless of whether police reports are a public official proceeding, private statements of police officers made to members of the news media are not. Wiemer v. Rankin, 117 Idaho 566, 790 P.2d 347 (1990).

RESEARCH REFERENCES

Am. Jur. — 50 Am. Jur. 2d, Libel and Slander, § 255 et seq.

C.J.S. — 53 C.J.S., Libel and Slander, § 104 et seq.

A.L.R. — Application of privilege attending statements made in course of judicial proceedings to pretrial deposition and discovery procedures. 23 A.L.R.3d 1172.

Out-of-court communications between attorneys made preparatory to, or in the course of or aftermath of, civil judicial proceedings as privileged. 36 A.L.R.3d 1328.

Relevancy of matter contained in pleading as affecting privilege within law of libel. 38 A.L.R.3d 272.

Privilege of reporting judicial proceedings as extending to proceeding held in secret or as to which record is sealed by court. 43 A.L.R.3d 634.

Employer's privilege as to communications to news media concerning employees. 52 A.L.R.3d 739.

Privileged nature of statements or utterances by member of school board in course of official proceedings. 85 A.L.R.3d 1137.

6-714. Malice not inferred from publication. — In the cases provided for in subdivisions (3) and (4) of the preceding section, malice is not inferred from the communication or publication.

History.
1963, ch. 158, § 9, p. 459.

RESEARCH REFERENCES

Am. Jur. — 50 Am. Jur. 2d, Libel and Slander, § 4, 5, 6, 32.

C.J.S. — 53 C.J.S., Libel and Slander, §§ 83 to 85.

CHAPTER 8

ACTIONS FOR NEGLIGENCE

6-801. Comparative negligence or comparative responsibility — Effect of contributory negligence. — Contributory negligence or comparative responsibility shall not bar recovery in an action by any person or his legal representative to recover damages for negligence, gross negligence or comparative responsibility resulting in death or in injury to person or property, if such negligence or comparative responsibility was not as great as the negligence, gross negligence or comparative responsibility of the person against whom recovery is sought, but any damages allowed shall be diminished in the proportion to the amount of negligence or comparative responsibility attributable to the person recovering. Nothing contained herein shall create any new legal theory, cause of action, or legal defense.

History.
1971, ch. 186, § 1, p. 862; am. 1987, ch. 278, § 2, p. 571.

STATUTORY NOTES

Cross References.
Assumption of risk by employee, §§ 44-1401, 44-1402.
Death of wrongdoer, survival of personal injury action, § 5-327.
Negligent homicide, revocation of driver's license, § 49-335.
Personal injuries, statute of limitations, § 5-219.

Effective Dates.
Section 18 of S.L. 1987, ch. 278 read: "The provisions of this act shall take effect on July 1, 1987, provided however, that Section [Sections] 1 through 11 shall apply only to causes of action which accrue on and after July 1, 1987. Provided further, that Section 6-1603, Idaho Code, as enacted herein, is hereby repealed and does sunset for causes of action which accrue after June 30, 1992."

JUDICIAL DECISIONS

ANALYSIS

Assumption of risk.
Comparative negligence claims.

Assumption of Risk.

Assumption of risk shall no longer be available as an absolute bar to recovery in any action; issues should be discussed in terms of contributory negligence, not assumption of risk, and applied accordingly under comparative negligence laws. The one exception involves a situation where a plaintiff, either in writing or orally, expressly assumes the risk involved. Salinas v. Vierstra, 107 Idaho 984, 695 P.2d 369 (1985).

Application of the implied assumption of risk doctrine is untenable in the era of comparative negligence established by this section. Harrison v. Taylor, 115 Idaho 588, 768 P.2d 1321 (1989).

Comparative Negligence Claims.

—In General.

Where two drivers collided at an uncontrolled intersection, plaintiff driver was not entitled to recover personal injury damages from defendant driver because each driver was 50 percent negligent for failing to keep a proper lookout. Vaughn v. Porter, 140 Idaho 470, 95 P.3d 88 (Ct. App. 2004).

—Arising Between 1971 and 1989.

The Idaho supreme court has applied *Harrison v. Taylor*, 115 Idaho 588, 768 P.2d 1321 (1989), applying principle of comparative negligence in negligence actions, retroactively to comparative negligence claims arising after the 1971 enactment of the comparative negligence statute, but before the date of *Harrison*, which was decided in January of 1989. Phillips v. United States, 801 F. Supp. 337 (D. Idaho 1992), aff'd, 15 F.3d 1088 (9th Cir. 1994).

Construction with Other Law.

This section and §§ 6-802 and 6-803 do not limit apportionment to cases involving contributory negligence. Blome v. Truksa, 130 Idaho 669, 946 P.2d 631 (1997) (decided under 1971 law).

Duty of Easement Owner.

Although an easement owner was not required to maintain and repair easement for benefit of servient landowner, the easement owner would be held to the general standard to use ordinary care in the management of easement property; only upon a finding that the easement owner had breached its duty would a determination be made as to the effect of the servient landowner's contributory negligence. Rehwalt v. American Falls Reservoir Dist. #2, 97 Idaho 634, 550 P.2d 137 (1976).

Imputed Negligence.

Although the court must compare the quantum of negligence of the "person seeking to recover" with that of the defendant, tort and agency law may require that the court charge an individual with the negligence of another, even though that individual has played no active role in bringing about the harm. Adams v. Krueger, 124 Idaho 74, 856 P.2d 864 (1993) (decision under law prior to 1987 amendment).

Inclusion of Nonparties to Lawsuit.

Where court is apportioning negligence under comparative negligence provisions of this section, it may include parties to the transaction which resulted in the injury whether or not they are parties to the lawsuit and this is true even though § 6-802 uses the term

"party"; although the statute requires that parties be included in the special verdict, it does not state that only parties shall be included. Pocatello Indus. Park Co. v. Steel W., Inc., 101 Idaho 783, 621 P.2d 399 (1980).

"Individual" Rule.

Idaho has adopted the "Wisconsin" or "individual" rule, whereby the plaintiff's negligence is compared to the negligence of each individual defendant so that a plaintiff cannot recover from a defendant found to be as negligent or less negligent than himself, rather than adopting the "unit" rule whereby plaintiff can recover from any negligent defendant, so long as plaintiff's negligence is less than the combined negligence of all defendants; accordingly, in action for damages caused by automobile collision with cow where plaintiff was 25 percent negligent, defendant cow owner was 10 percent negligent and defendant stockmen's association was 65 percent negligent, plaintiff could not recover damages from cow owner. Odenwalt v. Zaring, 102 Idaho 1, 624 P.2d 383 (1980).

The legislature, when it enacted comparative negligence legislation, adopted the "individual" rule which requires that, when comparing percentages of negligence, the negligence of the plaintiff must be compared against each individual defendant in determining whether the plaintiff may recover; a plaintiff must prove that a defendant's negligence was greater than that of the plaintiff before a judgment can be rendered against that defendant. Ross v. Coleman Co., 114 Idaho 817, 761 P.2d 1169 (1988).

Under the "individual rule" adopted by the Idaho legislature when it enacted comparative negligence, the negligence of the plaintiff must be compared against each individual defendant in determining whether the plaintiff may recover; in this case, the jury found that plaintiff was not negligent, but that there was negligence on the part of each of the four named defendants which was a proximate cause of any damages suffered by plaintiff; therefore, even if an unnamed party who allegedly removed the lighted barricade from the site of the excavation had been included on the verdict form, all of the named defendants would have been liable to plaintiff/motorcyclist for his injuries. Beitzel v. City of Coeur d'Alene, 121 Idaho 709, 827 P.2d 1160 (1992).

In General.

The questions posed under the provisions of this statute narrow and focus the factual determination by requiring a finding as to the quantum of the respective negligence of the plaintiff and defendant. Ryals v. Broadbent Dev. Co., 98 Idaho 392, 565 P.2d 982 (1977).

There is no language in this section requiring the abrogation of the common law remedy of equitable indemnity. Chenery v. Agri-Lines Corp., 115 Idaho 281, 766 P.2d 751 (1988).

There is a legislative mandate that comparative negligence shall apply in all negligence actions. Harrison v. Taylor, 115 Idaho 588, 768 P.2d 1321 (1989).

Although the legislature has generally espoused the comparative negligence approach for negligence actions, because it is not precluded from limiting or rejecting the application of that approach in actions arising out of particular circumstances, its enactment of a statutory bar to an action by an intoxicated person against the provider of alcohol was within its constitutional powers. Coghlan v. Beta Theta Pi Fraternity, 133 Idaho 388, 987 P.2d 300 (1999).

Joint and Several Liability.

The express language of portions of the comparative negligence act makes clear that the legislature intended to retain the general common law rule of joint and several liability. Tucker v. Union Oil Co., 100 Idaho 590, 603 P.2d 156 (1979).

The contention that a negligent tortfeasor's liability is to be limited solely to his proportionate fault would undermine the fundamental rationale of the joint and several liability doctrine. Tucker v. Union Oil Co., 100 Idaho 590, 603 P.2d 156 (1979).

Underlying the rejection of limiting damages to proportionate fault is the retention of the concept that each tortfeasor whose negligence is a proximate cause of an indivisible injury should remain individually liable for all compensable damages attributable to that injury. Tucker v. Union Oil Co., 100 Idaho 590, 603 P.2d 156 (1979).

Jury Instructions.

In plaintiff's action for recovery of damages for injuries sustained in fall, where plaintiff submitted a proposed jury instruction which was based on this section, plaintiff could not argue on appeal, from verdict denying any recovery, that this section was unconstitutional as a denial of equal protection of the law. Jackson v. Vangas, 97 Idaho 790, 554 P.2d 968 (1976).

Though it is not reversible error for the court to inform the jury of the effect of apportioning 50% or more of the negligence to the plaintiff, the trial courts should be given discretion not to so inform the jury in those cases where the issues are so complex or the legal issues so uncertain that such instructions would confuse or mislead the jury. Seppi v. Betty, 99 Idaho 186, 579 P.2d 683 (1978).

Jury Verdict Form.

All negligent actors contributing to the causation of any accident or injuries are required to be listed on the jury verdict form, whether or not they are parties to the action. Vannoy v.

Uniroyal Tire Co., 111 Idaho 536, 726 P.2d 648 (1985).

Since this section and § 6-802 envision apportionment where there is negligence attributable to the person recovering and since there was no contention that the plaintiffs were in any way negligent, inclusion on the verdict form of nonparty person whose negligence caused the accident was not required on verdict form. Hickman v. Fraternal Order of Eagles, 114 Idaho 545, 758 P.2d 704 (1988).

Landowner and Invitee.

The obviousness, or an invitee's knowledge, of a dangerous activity or condition does not excuse the land possessor's duty of care toward the invitee although such knowledge or the obviousness of the danger may be considered in evaluating the sufficiency of protective measures undertaken by the possessor and may be considered in evaluating a defense of contributory negligence, which may limit the land possessor's liability. If this defense is raised, the invitee's negligence in encountering the danger should be compared to the land possessor's negligence in failing to protect the invitee against it. Keller v. Holiday Inns, Inc., 105 Idaho 649, 671 P.2d 1112 (Ct. App. 1983), rev'd on other grounds, 107 Idaho 593, 691 P.2d 1208 (1984).

Legislative Intent.

It was the intention of the legislature to extend the comparative negligence rule to those invitees who have been injured since the comparative negligence statute went into effect, and the decision in *Harrison v. Taylor*, 115 Idaho 588, 768 P.2d 1321 (1989), where the open and obvious danger doctrine was abolished, is to be applied retroactively. Baker v. Shavers, Inc., 117 Idaho 696, 791 P.2d 1275 (1990).

Loss of Consortium.

A spouse's damages for loss of consortium should be reduced by the percentage of comparative negligence assigned to the injured spouse. Runcorn v. Shearer Lumber Prods., Inc., 107 Idaho 389, 690 P.2d 324 (1984).

Medical Malpractice.

District court properly imputed nurse's negligence to doctor under the doctrine of respondent superior, where nurse misdiagnosed a severe yeast infection as herpes, and doctor later prescribed ointment for herpes. Adams v. Krueger, 124 Idaho 74, 856 P.2d 864 (1993) (decision under law prior to 1987 amendment).

Natural Accumulations.

This section does not allow an exemption for negligence as to natural accumulations, as to do so would require construing the statute as allowing the application of comparative negligence in some cases but not in others. Robertson v. Magic Valley Regional Medical Ctr., 117 Idaho 979, 793 P.2d 211 (1990).

Open and Obvious Danger.

The open and obvious danger doctrine, born in the era of contributory negligence, has been abolished legislatively through the adoption of this section. Harrison v. Taylor, 115 Idaho 588, 768 P.2d 1321 (1989).

Product Liability.

The rationale of comparative negligence was meant to apply in product liability actions so that unforeseeable misuse would not be an absolute bar to recovery; therefore, in a wrongful death action arising out of an airplane crash, where the jury returned a special verdict finding that members of the airplane's crew were 90% at fault for the crash with airplane manufacturer being responsible for remaining 10% of causation, the doctrine of comparative causation was properly applied. Sun Valley Airlines v. Avco-Lycoming Corp., 411 F. Supp. 598 (D. Idaho 1976).

Proportion of Damages Recoverable.

A jury finding that 50% of the negligence was attributable to the plaintiff would preclude any recovery by the plaintiff. Seppi v. Betty, 99 Idaho 186, 579 P.2d 683 (1978).

In an action for personal injuries, a plaintiff cannot recover when it is proven by the evidence that his negligence was a proximate cause of his injury, and that his negligence was equal to or greater than the negligence of the defendant notwithstanding that the evidence may also show negligence on the part of the defendant, and since in a wrongful death action, decedent's parents' claim arises from the same facts, they should not be entitled to recover for losses and damages resulting from their son's death when he equally contributed to his own death. Bevan v. Vassar Farms, Inc., 117 Idaho 1038, 793 P.2d 711 (1990).

Special Verdict.

In a comparative negligence case, it is prejudicial error if court instructs the jury on the effect that its fact-finding answers, in a special verdict, will have on the outcome of the case. McGinn v. Utah Power & Light Co., 529 P.2d 423 (Utah 1974).

Suicide.

Doctrine of supervening causation was inapplicable to both the wrongful death action, and the parent's cause of action for negligent infliction of emotional distress and question was more appropriately one of comparative negligence in parent's tort action against school district and teacher regarding student's suicide. Brooks v. Logan, 127 Idaho 484, 903 P.2d 73 (1995).

Summary Judgment.

Since the advent of comparative negligence, contributory negligence of the plaintiff is not

grounds for granting summary judgment in favor of the defendant but requires the trier of fact to compare the contributory negligence of the plaintiff with that of the defendant. McKinley v. Fanning, 100 Idaho 189, 595 P.2d 1084 (1979).

Where evidence established that plaintiff stopped his motorcycle next to the highway surface for a period of time prior to the accident, there was no obstruction to defendant's vision as he approached point where plaintiff was stopped, but defendant stated he did not observe plaintiff until immediately before the impact, the facts did not present the rare situation where reasonable minds could not differ on an interpretation of the facts as claimed by the respective parties, so that summary judgment was not proper under this section. Robinson v. Westover, 101 Idaho 766, 620 P.2d 1096 (1980).

In determining whether summary judgment can be granted under this section, the issue is not just whether the plaintiff was guilty of contributory negligence but whether as a matter of law, his contributory negligence was equal to or greater than the negligence of the defendant. Robinson v. Westover, 101 Idaho 766, 620 P.2d 1096 (1980).

"Unit" Rule.

The provisions of § 73-114 cannot be applied to this section in order to imply legislative support of the "unit" rule in Idaho comparative negligence cases since § 73-114 is to be used only to give effect to legislative intent, not to determine it. Odenwalt v. Zaring, 102 Idaho 1, 624 P.2d 383 (1980).

Wrongful Death Action.

In a wrongful death action in which plaintiffs alleged that their son died as a result of the reckless and negligent conduct of defendant, who had engaged the decedent to descend into a drill shaft to make repairs to broken equipment, the trial court correctly instructed the jury that the plaintiffs could not recover damages unless the decedent could have recovered for his injuries had he survived. Anderson v. Gailey, 97 Idaho 813, 555 P.2d 144 (1976).

Plaintiffs can recover for wrongful death only when the wrongful act would have entitled the person injured to maintain an action if death had not ensued; thus, if the decedent's negligence was not as great as that of the defendants; then decedent's heirs would be entitled to recover for their loss reduced by the percentage of decedent's negligence; however, where the decedent's negligence is equal to or greater than the defendant's negligence, then the decedent's heirs are barred from recovery as would be the injured party had he survived. Bevan v. Vassar Farms, Inc., 117 Idaho 1038, 793 P.2d 711 (1990).

Cited in: Fairchild v. Olsen, 96 Idaho 338, 528 P.2d 900 (1974); Hoffman v. Simplot Aviation, Inc., 97 Idaho 32, 539 P.2d 584 (1975); Johnston v. Pierce Packing Co., 550 F.2d 474 (9th Cir. 1977); Viehweg v. Thompson, 103 Idaho 265, 647 P.2d 311 (Ct. App. 1982); Duff v. Bonner Bldg. Supply, Inc., 103 Idaho 432, 649 P.2d 391 (Ct. App. 1982); Sheets v. Agro-West, Inc., 104 Idaho 880, 664 P.2d 787 (Ct. App. 1983); Quick v. Crane, 111 Idaho 759, 727 P.2d 1187 (1986); Leliefeld v. Panorama Contractors, 111 Idaho 897, 728 P.2d 1306 (1986); Borchard v. Wefco, Inc., 112 Idaho 555, 733 P.2d 776 (1987); Hughes v. Union Pac. R.R., 114 Idaho 466, 757 P.2d 1185 (1988); Hydraulic & Air Equip. Co. v. Mobil Oil Corp., 117 Idaho 130, 785 P.2d 947 (1989); Collins v. Schweitzer, Inc., 774 F. Supp. 1253 (D. Idaho 1991); Collins v. Collins, 130 Idaho 705, 946 P.2d 1345 (Ct. App. 1997); Murphy v. Union Pac. R.R., 138 Idaho 88, 57 P.3d 799 (2002).

RESEARCH REFERENCES

C.J.S. — 65 C.J.S., Negligence, §§ 291, 294, 306, 307, 309, 310.

65A C.J.S., Negligence, § 856.

A.L.R. — Liability for automobile accident at intersection as affected by reliance upon or disregard of unchanging stop signal or sign. 3 A.L.R.3d 180.

Negligence and contributory negligence in suit by rescuer against rescued person. 4 A.L.R.3d 558.

Contributory negligence of child injured while climbing over or through railroad train blocking crossing. 11 A.L.R.3d 1168.

Contributory negligence or assumption of risks of one injured by firearm or air gun discharged by another. 25 A.L.R.3d 518.

Retrospective application of state statute substituting rule of comparative negligence for that of contributory negligence. 37 A.L.R.3d 1438.

Imputation of servant's or agent's contributory negligence to master or principle. 53 A.L.R.3d 664.

Imputation of contributory negligence of servant or agent to master or principle in action by master or principle against another servant or agent for negligence in connection with duties. 57 A.L.R.3d 1226.

Permitting child to walk to school unattended as contributory negligence of parents in action for injury or death of child. 62 A.L.R.3d 541.

Modern development of comparative negligence doctrine having applicability to negligence actions generally. 78 A.L.R.3d 339.

Judicial adoption of comparative negligence

doctrine as applicable retrospectively. 78 A.L.R.3d 421.

Choice of law as to application of comparative negligence doctrine. 86 A.L.R.3d 1206.

Automobile occupant's failure to use seat belt as contributory negligence. 92 A.L.R.3d 9.

Modern trends as to contributory negligence of children. 32 A.L.R.4th 56.

Motorcyclist's failure to wear helmet or other protective equipment as affecting recovery for personal injury or death. 85 A.L.R.4th 365.

Comparative negligence, contributory negligence and assumption of risk in action against owner of store, office, or similar place of business by invitee falling on tracked-in water or snow. 83 A.L.R.5th 589.

Contributory negligence or comparative negligence based on failure of patient to follow instructions as defense in action against physician or surgeon for medical malpractice. 84 A.L.R.5th 619.

6-802. Verdict giving percentage of negligence or comparative responsibility attributable to each party. — The court may, and when requested by any party shall, direct the jury to find separate special verdicts determining the amount of damages and the percentage of negligence or comparative responsibility attributable to each party; and the court shall then reduce the amount of such damages in proportion to the amount of negligence or comparative responsibility attributable to the person recovering. Nothing contained herein shall create any new legal theory, cause of action, or legal defense.

History.

1971, ch. 186, § 2, p. 862; am. 1987, ch. 278, § 3, p. 571.

STATUTORY NOTES

Effective Dates.

Section 18 of S.L. 1987, ch. 278 read: "The provision of this act shall take effect on July 1, 1987, provided however, that Section [Sections] 1 through 11 shall apply only to causes of action which accrue on and after July 1, 1987. Provided further, that Section 6-1603, Idaho Code, as enacted herein, is hereby repealed and does sunset for causes of action which accrue after June 30, 1992."

JUDICIAL DECISIONS

Analysis

Construction with other law.
Contributory negligence.
Discretion of court.
Imputed negligence.
"Individual" rule.
Joint tortfeasors.
Jury instructions.
Jury verdict form.
Mandatory apportionment.
Party.
Proportion of damages recoverable.
Wrongful death action.

Construction with other law.

Sections 6-801, 6-803 and this section, do not limit apportionment to cases involving contributory negligence. Blome v. Truksa, 130 Idaho 669, 946 P.2d 631 (1997) (decided under 1971 law).

Contributory Negligence.

Since the advent of comparative negligence, contributory negligence of the plaintiff is not grounds for granting summary judgment in favor of the defendant, but requires the trier of fact to compare the contributory negligence

of the plaintiff with that of the defendant. McKinley v. Fanning, 100 Idaho 189, 595 P.2d 1084 (1979).

Discretion of Court.

Where the sole issue at trial was whether defendants' uncontested negligence proximately caused plaintiffs' alleged injuries, and issues material to the comparative negligence scheme were not raised at trial, the trial judge's discretion was not displaced by a statutory duty to use a special interrogatory verdict form. Preuss v. Thomson, 112 Idaho 169, 730 P.2d 1089 (Ct. App. 1986).

Imputed Negligence.

Although the court must compare the quantum of negligence of the "person seeking to recover" with that of the defendant, tort and agency law may require that the court charge an individual with the negligence of another, even though that individual has played no active role in bringing about the harm. Adams v. Krueger, 124 Idaho 74, 856 P.2d 864 (1993) (decision under law prior to 1987 amendment).

"Individual" Rule.

The legislature, when it enacted comparative negligence legislation, adopted the "individual" rule which requires that, when comparing percentages of negligence, the negligence of the plaintiff must be compared against each individual defendant in determining whether the plaintiff may recover; a plaintiff must prove that a defendant's negligence was greater than that of the plaintiff before a judgment can be rendered against that defendant. Ross v. Coleman Co., 114 Idaho 817, 761 P.2d 1169 (1988).

Under the "individual rule" adopted by the Idaho legislature when it enacted comparative negligence, the negligence of the plaintiff must be compared against each individual defendant in determining whether the plaintiff may recover; in this case, the jury found that plaintiff was not negligent, but that there was negligence on the part of each of the four named defendants which was a proximate cause of any damages suffered by plaintiff; therefore, even if an unnamed party who allegedly removed the lighted barricade from the site of the excavation had been included on the verdict form, all of the named defendants would have been liable to plaintiff/motorcyclist for his injuries. Beitzel v. City of Coeur d'Alene, 121 Idaho 709, 827 P.2d 1160 (1992).

Joint Tortfeasors.

Sections 6-801, 6-803 and this section authorize apportionment in joint and several liability cases. Blome v. Truksa, 130 Idaho 669, 946 P.2d 631 (1997) (decided under 1971 law).

Jury Instructions.

Though it is not reversible error for the court to inform the jury of the effect of apportioning 50% or more of the negligence to the plaintiff, the trial courts should be given discretion not to so inform the jury in those cases where the issues are so complex or the legal issues so uncertain that such instructions would confuse or mislead the jury. Seppi v. Betty, 99 Idaho 186, 579 P.2d 683 (1978).

Jury Verdict Form.

Since § 6-801 and this section envision apportionment where there is negligence attributable to the person recovering and since there was no contention that the plaintiffs were in any way negligent, inclusion on the verdict form of nonparty person whose negligence caused the accident was not required on verdict form. Hickman v. Fraternal Order of Eagles, 114 Idaho 545, 758 P.2d 704 (1988).

This section has been interpreted to allow not only that the parties be included in the special verdict, but may also include parties to the transaction which resulted in the injury whether or not they are parties to the lawsuit; the justification for placing nonparties on a jury verdict was that true apportionment could not be achieved unless it included all tortfeasors guilty of causal negligence either causing or contributing to the occurrence in question, whether or not they were parties to the case. Van Brunt v. Stoddard, 136 Idaho 681, 39 P.3d 621 (2001).

In a medical malpractice and wrongful death case, where a cell saver technician left a surgery and allowed a reinfusion blood bag to empty, causing a fatal air embolism, the hospital where the surgery took place, the anesthesiology practice attending the surgery, and the manufacturer of the cell saver machine were properly excluded from the special verdict form, under this section, because no expert testimony was produced demonstrating that any of the entities' actions fell below the applicable community standard of care. Jones v. Crawforth, 147 Idaho 11, 205 P.3d 660 (2009).

Mandatory Apportionment.

Although special verdict form prefaced apportionment of fault as "advisory," according to the plain language of this section, such an apportionment was mandatory. "Advisory" language to the contrary, once respondent requested the jury to find separate special verdicts determining percentages of negligence attributable to each, the jury was required to and did apportion fault. Blome v. Truksa, 130 Idaho 669, 946 P.2d 631 (1997) (decided under 1971 law).

Party.

Where court is apportioning negligence under comparative negligence provisions of § 6-

801, it may include parties to the transaction which resulted in the injury whether or not they are parties to the lawsuit and this is true even though this section uses the term "party," since, although this section requires that parties be included in the special verdict, it does not state that only parties shall be included. Pocatello Indus. Park Co. v. Steel W., Inc., 101 Idaho 783, 621 P.2d 399 (1980).

Proportion of Damages Recoverable.

A jury finding that 50% of the negligence was attributable to the plaintiff would preclude any recovery by the plaintiff. Seppi v. Betty, 99 Idaho 186, 579 P.2d 683 (1978).

Wrongful Death Action.

Plaintiffs can recover for wrongful death only when the wrongful act would have entitled the person injured to maintain an action if death had not ensued; thus, if the decedent's negligence was not as great as that of the defendants, then decedent's heirs would be entitled to recover for their loss reduced by the percentage of decedent's negligence; however, where the decedent's negligence is equal to or greater than the defendant's negligence, then the decedent's heirs are barred from recovery as would be the injured party had he survived. Bevan v. Vassar Farms, Inc., 117 Idaho 1038, 793 P.2d 711 (1990).

In an action for personal injuries, a plaintiff cannot recover when it is proven by the evidence that his negligence was a proximate cause of his injury, and that his negligence was equal to or greater than the negligence of the defendant notwithstanding that the evidence may also show negligence on the part of the defendant; and since in a wrongful death action, decedent's parents' claim arises from the same facts, they should not be entitled to recover for losses and damages resulting from their son's death when he equally contributed to his own death. Bevan v. Vassar Farms, Inc., 117 Idaho 1038, 793 P.2d 711 (1990).

Cited in: Fairchild v. Olsen, 96 Idaho 338, 528 P.2d 900 (1974); Duff v. Bonner Bldg. Supply, Inc., 103 Idaho 432, 649 P.2d 391 (Ct. App. 1982); Buckley v. Orem, 112 Idaho 117, 730 P.2d 1037 (Ct. App. 1986); Highland Enters., Inc. v. Barker, 133 Idaho 330, 986 P.2d 996 (1999); Van Brunt v. Stoddard, 136 Idaho 681, 39 P.3d 621 (2001).

RESEARCH REFERENCES

A.L.R. — Comparative negligence, contributory negligence and assumption of risk in action against owner of store, office, or similar place of business by invitee falling on tracked-in water or snow. 83 A.L.R.5th 589.

6-803. Contribution among joint tortfeasors — Declaration of right — Exception — Limited joint and several liability. — (1) The right of contribution exists among joint tortfeasors, but a joint tortfeasor is not entitled to a money judgment for contribution until he has by payment discharged the common liability or has paid more than his pro rata share thereof.

(2) A joint tortfeasor who enters into a settlement with the injured person is not entitled to recover contribution from another joint tortfeasor whose liability to the injured person is not extinguished by the settlement.

(3) The common law doctrine of joint and several liability is hereby limited to causes of action listed in subsection (5) of this section. In any action in which the trier of fact attributes the percentage of negligence or comparative responsibility to persons listed on a special verdict, the court shall enter a separate judgment against each party whose negligence or comparative responsibility exceeds the negligence or comparative responsibility attributed to the person recovering. The negligence or comparative responsibility of each such party is to be compared individually to the negligence or comparative responsibility of the person recovering. Judgment against each such party shall be entered in an amount equal to each party's proportionate share of the total damages awarded.

(4) As used herein, "joint tortfeasor" means one (1) of two (2) or more persons jointly or severally liable in tort for the same injury to person or

property, whether or not judgment has been recovered against all or some of them.

(5) A party shall be jointly and severally liable for the fault of another person or entity or for payment of the proportionate share of another party where they were acting in concert or when a person was acting as an agent or servant of another party. As used in this section, "acting in concert" means pursuing a common plan or design which results in the commission of an intentional or reckless tortious act.

History.

1971, ch. 186, § 3, p. 862; am. 1987, ch. 278, § 4, p. 571; am. 1990, ch. 120, § 1, p. 290; am. 2003, ch. 122, § 1, p. 370.

STATUTORY NOTES

Compiler's Notes.

Section 5 of S.L. 2003, ch. 122 provides: "Severability. The provisions of this act are hereby declared to be severable and if any provision of this act or the application of such provision to any person or circumstance is declared invalid for any reason, such declaration shall not affect the validity of remaining portions of this act."

Effective Dates.

Section 18 of S.L. 1987, ch. 278 read: "The provisions of this act shall take effect on July 1, 1987, provided however, that Section [Sections] 1 through 11 shall apply only to causes of action which accrue on and after July 1, 1987. Provided further, that Section 6-1603, Idaho Code, as enacted herein, is hereby repealed and does sunset for causes of action which accrue after June 30, 1992."

Section 6 of S.L. 2003, ch. 122 provides: "This act shall be in full force and effect on and after July 1, 2003. Sections 1 through 3 of this act shall apply to all causes of action which accrue thereafter. Section 4 of this act shall apply to all cases in which an appeal is filed thereafter."

JUDICIAL DECISIONS

Analysis

Agents.

Hospital could be found vicariously liable for the negligence of an independently contracted cell saver technician under Idaho's doctrine of apparent agency. The extension of apparent agency to medical malpractice claims is consistent with Idaho's Medical Malpractice Act, § 6-1001 et seq.; the term "agent" as used in this section encompasses express agents, implied agents, and apparent agents under Idaho law. Jones v. Healthsouth Treasure Valley Hosp., 147 Idaho 109, 206 P.3d 473 (2009).

Common Liability.

Where a woman passenger in an automobile signed an agreement specifically releasing the plaintiff-driver from liability for her injuries suffered in a collision with the defendant's vehicle and where the defendant discharged its liability to the passenger by way of settlement, the defendant was entitled to

proceed under this section for contribution from the plaintiff-driver, but could not recover unless he established that such driver shared a common liability for the passenger's injuries. Brockman Mobile Home Sales v. Lee, 98 Idaho 530, 567 P.2d 1281 (1977).

Where the defendant made no showing that the plaintiff-driver acted in gross negligence, intentionally or while intoxicated, and thereby shared a common liability with the defendant for injuries suffered by the plaintiff's passenger in an automobile collision, the defendant could not hold the plaintiff for contribution. Brockman Mobile Home Sales v. Lee, 98 Idaho 530, 567 P.2d 1281 (1977).

Underlying the rejection of limiting damages to proportionate fault is the retention of the concept that each tortfeasor whose negligence is a proximate cause of an indivisible injury should remain individually liable for all compensable damages attributable to that injury. Tucker v. Union Oil Co., 100 Idaho 590, 603 P.2d 156 (1979).

Construction With Other Law.

Sections 6-801, 6-802 and this section do not limit apportionment to cases involving contributory negligence. Blome v. Truksa, 130 Idaho 669, 946 P.2d 631 (1997) (decided under 1971 law).

Contract Specification Defense.

A public or private contractor following plans and specifications prepared by another party is not liable in negligence where defects in the plans and specifications cause injuries, so long as the contractor should not have reasonably known about the defects. Factual questions such as whether the defects should have been known by the contractor, or whether a particular set of plans was sufficient such that a reasonable contractor would have relied on them, are best left for resolution by the fact finder. Craig Johnson Constr., L.L.C. v. Floyd Town Architects, P.A., 142 Idaho 797, 134 P.3d 648 (2006).

Discharge from Liability.

Neither a covenant not to sue nor a release can operate to discharge joint tort-feasors from liability, thus allowing contribution to be recovered, unless the agreement contains specific language to that effect. Brockman Mobile Home Sales v. Lee, 98 Idaho 530, 567 P.2d 1281 (1977).

Effect of Contribution.

While there may be an equitable readjustment by contribution among multiple tortfeasors, such has no effect on the total liability of any individual tortfeasors to the injured plaintiff. Tucker v. Union Oil Co., 100 Idaho 590, 603 P.2d 156 (1979).

Guest Statute.

The decision in *Thompson v. Hagan*, 96 Idaho 19, 523 P.2d 1365 (1974), declaring the guest statute (now § 49-2415) unconstitutional, applies only to negligence actions brought by passengers against host-drivers. Brockman Mobile Home Sales v. Lee, 98 Idaho 530, 567 P.2d 1281 (1977).

"Individual" Rule.

The legislature, when it enacted comparative negligence legislation, adopted the "individual" rule which requires that, when comparing percentages of negligence, the negligence of the plaintiff must be compared against each individual defendant in determining whether the plaintiff may recover; a plaintiff must prove that a defendant's negligence was greater than that of the plaintiff before a judgment can be rendered against that defendant. Ross v. Coleman Co., 114 Idaho 817, 761 P.2d 1169 (1988).

Under the "individual rule" adopted by the Idaho legislature when it enacted comparative negligence, the negligence of the plaintiff must be compared against each individual defendant in determining whether the plaintiff may recover; in this case, the jury found that plaintiff was not negligent, but that there was negligence on the part of each of the four named defendants which was a proximate cause of any damages suffered by plaintiff; therefore, even if an unnamed party who allegedly removed the lighted barricade from the site of the excavation had been included on the verdict form, all of the named defendants would have been liable to plaintiff/motorcyclist for his injuries. Beitzel v. City of Coeur d'Alene, 121 Idaho 709, 827 P.2d 1160 (1992).

Intentional Torts.

Even if the co-worker's conduct could be properly characterized as intentional rather than negligent, his name could be included on the special verdict form for purposes of apportionment of responsibility. Rausch v. Pocatello Lumber Co., 135 Idaho 80, 14 P.3d 1074 (Ct. App. 2000).

Joint Tortfeasors.

Sections 6-801, 6-802 and this section authorize apportionment in joint and several liability cases. Blome v. Truksa, 130 Idaho 669, 946 P.2d 631 (1997) (decided under 1971 law).

With the limitation of joint and several liability as a result of the 1987 amendment to this section, the failure to include a nonparty tortfeasor on the verdict form will affect the outcome even in cases in which there is no negligence attributable to the plaintiff(s), except where it is undisputed that the defendant is jointly and severally liable with all nonparty tortfeasors under subsection (5). Dep't of Labor v. Sunset Marts, Inc., 140 Idaho 207, 91 P.3d 1111 (2004).

In an Idaho Tort Claims Act, § 6-901 et

seq., a Utah sheriff, who was pursuing a fleeing motorist, and the motorist, who was attempting to evade arrest, were not pursuing a common plan or design; thus, the district court was correct in holding that the sheriff and the motorist were not acting in concert and could not be held jointly and severally liable for injuries to a third person. The defendant county in Utah could only be liable for a pro rata share of the total damages awarded to the injured party, based on the reckless disregard of its employee, the sheriff. Athay v. Stacey, 146 Idaho 407, 196 P.3d 325 (2008).

Liability of State.

To the extent that sovereign immunity has been abrogated by the state, it has subjected itself to liability for its negligent acts and the negligent acts of its employees; to that same extent, the state shares a common liability with third party private tortfeasors. Masters v. State, 105 Idaho 197, 668 P.2d 73 (1983).

The state was a "joint tortfeasor" where personal injury action was brought against both the state and motorcyclist and his wife and judgment thereon was rendered against both, holding them jointly and severally liable in tort for the same injury. Masters v. State, 105 Idaho 197, 668 P.2d 73 (1983).

Right to Contribution.

Neither the tort claims act nor statutes governing contribution among joint tortfeasors contain any indication that the state is prohibited from obtaining contribution from a joint tortfeasor. Masters v. State, 105 Idaho 197, 668 P.2d 73 (1983).

Liability to Original Party.

Contribution may only be obtained among defendants who would have been liable to the original injured party. Hydraulic & Air Equip. Co. v. Mobil Oil Corp., 117 Idaho 130, 785 P.2d 947 (1989) (decided under 1982 version of this section).

Master and Servant.

Evidence of the existence of a master and servant relationship is sufficient to establish that master and servant are joint tortfeasors within the meaning of subsection (4). Holve v. Draper, 95 Idaho 193, 505 P.2d 1265 (1973).

Proof.

In order to prove a contribution claim against two joint tortfeasors, plaintiff must have discharged a common liability which plaintiff and the joint tortfeasors had to the original injured party. To prove such a liability, plaintiff must show that it, and its joint tortfeasors, were more at fault than the original injured party. Hydraulic & Air Equip. Co. v. Mobil Oil Corp., 117 Idaho 130, 785 P.2d 947 (1989) (decided under 1982 version of this section).

Required Proof.

Hemophiliac who was infected with human immunodeficiency virus was required to prove which of the two providers of the clotting agent Factor VIII caused the injury in order to recover under negligence theory. Doe v. Cutter Biological, 852 F. Supp. 909 (D. Idaho 1994), appeal dismissed, 89 F.3d 844 (9th Cir. 1996).

Cited in: Payne v. Foley, 102 Idaho 760, 639 P.2d 1126 (1982); International Harvester Co. v. TRW, Inc., 107 Idaho 1123, 695 P.2d 1262 (1985); Quick v. Crane, 111 Idaho 759, 727 P.2d 1187 (1986); Luna v. Shockey Sheet Metal & Welding Co., 113 Idaho 193, 743 P.2d 61 (1987); Griggs v. Nash, 116 Idaho 228, 775 P.2d 120 (1989); Knutsen v. Cloud, 142 Idaho 148, 124 P.3d 1024 (2005).

RESEARCH REFERENCES

Am. Jur. — 18 Am. Jur. 2d, Contribution, § 39 et seq.

A.L.R. — Liability insurance policy as covering insurer's obligation to indemnify, or make contributions to, co-tort-feasor. 4 A.L.R.3d 620.

Comparative negligence rule where misconduct of three or more persons is involved. 8 A.L.R.3d 722.

Right of third person to recover contribution from host-driver for injuries or death of guest, where host is not liable to guest under guests statute. 26 A.L.R.3d 1283.

Right of manufacturer or seller to contribution or indemnity from user of product causing injury or damage to third person, and vice versa. 28 A.L.R.3d 943.

Right of one liable under Civil Damage Act to contribution or indemnity from intoxicated person, or vice versa. 31 A.L.R.3d 438.

Tort-feasor's general release of co-tort-feasor as affecting former's right to contribution against co-tort-feasor. 34 A.L.R.3d 1374.

Contribution of or indemnity between joint tort-feasors on basis of relative fault. 53 A.L.R.3d 184.

Contribution or indemnity between joint tort-feasors on basis of relative fault. 53 A.L.R.3d 184.

When statute of limitations commences to run against claim for contribution or indemnity based on tort. 57 A.L.R.3d 867.

What statute of limitations applies to action for contribution against joint tort-feasor. 57 A.L.R.3d 927.

Right of tort-feasor to contribution from joint tort-feasor who is spouse or otherwise in

close familial relationship to injured party. 25 A.L.R.4th 1120.

Right of tort-feasor initially causing injury to recover indemnity or contribution from medical attendant causing new injury or aggravating injury in course of treatment. 72 A.L.R.4th 231.

6-804. Common law liabilities preserved. — Nothing in this act affects:

(1) The common law liability of the several joint tortfeasors to have judgment recovered and payment made from them individually by the injured person for the whole injury shall be limited to causes of action listed in section 6-803, Idaho Code. However, the recovery of a judgment by the injured person against one (1) joint tortfeasor does not discharge the other joint tortfeasors.

(2) Any right of indemnity under existing law.

History.

1971, ch. 186, § 4, p. 862; am. 1987, ch. 278, § 5, p. 571.

STATUTORY NOTES

Compiler's Notes.

The words "this act" refer to S.L. 1971, ch. 186, compiled as §§ 6-801 to 6-806.

Effective Dates.

Section 18 of S.L. 1987, ch. 278 read: "The provisions of this act shall take effect on July 1, 1987, provided however, that Section [Sections] 1 through 11 shall apply only to causes of action which accrue on and after July 1, 1987. Provided further, that Section 6-1603, Idaho Code, as enacted herein, is hereby repealed and does sunset for causes of action which accrue after June 30, 1992."

JUDICIAL DECISIONS

Analysis

Indemnity.
Joint and several liability.
Respondeat superior.

Indemnity.

An attorney who was sued by a client for failing to commence an action in a timely manner did not have an equitable right to indemnity from the party or parties against whom the action was to be brought. Mitchell v. Valerio, 124 Idaho 283, 858 P.2d 822 (Ct. App. 1993).

Joint and Several Liability.

The express language of portions of the comparative negligence act make clear that the legislature intended to retain the general common law rule of joint and several liability. Tucker v. Union Oil Co., 100 Idaho 590, 603 P.2d 156 (1979).

The contention that a negligent tortfeasor's liability is to be limited solely to his proportionate fault would undermine the fundamental rationale of the joint and several liability doctrine. Tucker v. Union Oil Co., 100 Idaho 590, 603 P.2d 156 (1979).

Respondeat Superior.

Where negligence of nurse was imputed to doctor under doctrine of respondeat superior, comparative negligence law did not affect doctor's common-law right to indemnification from nurse. Adams v. Krueger, 124 Idaho 97, 856 P.2d 887 (Ct. App. 1993).

Cited in: Vannoy v. Uniroyal Tire Co., 111 Idaho 536, 726 P.2d 648 (1985).

RESEARCH REFERENCES

C.J.S. — 65 C.J.S., Negligence, § 294.

6-805. Effect of release of one tortfeasor on liability of others. — (1) A release by the injured person of one (1) joint tortfeasor, whether before or after judgment, does not discharge the other tortfeasors unless the release so provides, but, unless otherwise provided in subsection (2) of this section, reduces the claim against the other tortfeasors in the amount of the consideration paid for the release, or in any amount or proportion by which the release provides that the total claim shall be reduced, if such amount or proportion is greater than the consideration paid.

(2) A release by the injured person of one (1) or more tortfeasors who are not jointly and severally liable to the injured person, whether before or after judgment, does not discharge another tortfeasor or reduce the claim against another tortfeasor unless the release so provides and the negligence or comparative responsibility of the tortfeasor receiving the release is presented to and considered by the finder of fact, whether or not the finder of fact apportions responsibility to the tortfeasor receiving the release.

History.
1971, ch. 186, § 5, p. 862; am. 1991, ch. 249, § 1, p. 617.

JUDICIAL DECISIONS

Analysis

Credit of Settlement Against Verdict.

Under this section, the amount a plaintiff receives in settlement from a party should be deducted from the plaintiff's judgment even though the settling party was never judicially determined technically to be a joint tortfeasor. Quick v. Crane, 111 Idaho 759, 727 P.2d 1187 (1986).

In an action for personal injuries arising from an automobile accident, the amount of the plaintiff's settlements with other parties in the action could be credited against his total verdict whether or not they were found to be liable to him. Quick v. Crane, 111 Idaho 759, 727 P.2d 1187 (1986).

Determination of Joint Tortfeasors.

The trial court's determination whether a settling party is a joint tortfeasor must be based on the pleadings and not the jury's apportionment of liability. Quick v. Crane, 111 Idaho 759, 727 P.2d 1187 (1986).

Store that had entered into a settlement with a family and a manufacturer, against whom a wrongful death action was brought, were not jointly and severally liable for the damage award because they were not "acting in concert" with one another and neither acted "as an agent or servant" for the other. The store's settlement agreement simply protected the store against any claim for contribution or indemnity by other tortfeasors, but in no way discharged or reduced the claim against any other tortfeasors. Horner v. Sani-Top, Inc., 143 Idaho 230, 141 P.3d 1099 (2006).

Discharge from Liability.

Under this section and § 6-806 neither a covenant not to sue nor a release can operate to discharge other tort-feasors from liability unless the agreement contains specific language to that effect. Holve v. Draper, 95 Idaho 193, 505 P.2d 1265 (1973).

The trial court erred in ruling as a matter of law that the department of transportation was not released by agreement between accident victim and driver of car, where department argued that by using the term "persons" in the agreement the parties intended to release the government. Esterbrook v. State, 124 Idaho 680, 863 P.2d 349 (1993).

Offset Not Appropriate.

Trial court did not err in holding that payments for medical and funeral expenses were simply part of a store's overall settlement with a family and, therefore, the judgment against a manufacturer in a wrongful death action resulting from the same events was not

improper because of the court's denial to the manufacturer of an offset of the amount of those payments. Horner v. Sani-Top, Inc., 143 Idaho 230, 141 P.3d 1099 (2006).

Retroactive Application.

The 1991 amendment, making this section consistent with prior elimination of joint and several liability, was remedial, and it could be applied retroactively. Tuttle v. Wayment Farms, Inc., 131 Idaho 105, 952 P.2d 1241 (1998).

Cited in: Vannoy v. Uniroyal Tire Co., 111 Idaho 536, 726 P.2d 648 (1985); Smallwood v. Dick, 114 Idaho 860, 761 P.2d 1212 (1988).

RESEARCH REFERENCES

Am. Jur. — 18 Am. Jur. 2d, Contribution, § 20.

A.L.R. — Voluntary payment into court of judgment against one joint tort-feasor as release of others. 40 A.L.R.3d 1181.

Liability of governmental immunity or public officer for personal injury or damages arising out of vehicular accident due to negligent or defective design of highway. 45 A.L.R.3d 875; 58 A.L.R.4th 559.

Release of one negligently treating injury as affecting liability of one originally responsible for injury. 64 A.L.R.3d 839.

Validity and effect of "Mary Carter" or similar agreement setting maximum liability of one cotortfeasor and providing for reduction or extinguishment thereof relative to recovery against non-agreeing co-tort-feasor. 22 A.L.R.5th 483.

Release of, or covenant not to sue, one primarily liable for tort, but expressly reserving rights against one secondarily liable, as bar to recovery against latter. 24 A.L.R.4th 547.

6-806. Effect of release of one tortfeasor on his liability for contribution to others — Limits on application of section. — A release by the injured person of one (1) joint tortfeasor does not relieve him from liability to make contribution to another joint tortfeasor unless the release is given before the right of the other tortfeasor to secure a money judgment for contribution has accrued, and provides for a reduction, to the extent of the pro rata share of the released tortfeasor, of the injured person's damages recoverable against all the other tortfeasors. This section shall apply only if the issue of proportionate fault is litigated between joint tortfeasors in the same action.

History.

1971, ch. 186, § 6, p. 862.

JUDICIAL DECISIONS

Discharge of Liability.

Under this section and § 6-805 neither a covenant not to sue nor a release can operate to discharge other tortfeasors from liability unless the agreement contains specific language to that effect. Holve v. Draper, 95 Idaho 193, 505 P.2d 1265 (1973).

Cited in: Vannoy v. Uniroyal Tire Co., 111 Idaho 536, 726 P.2d 648 (1985); Quick v. Crane, 111 Idaho 759, 727 P.2d 1187 (1986); Truck Ins. Exch. v. Bishara, 128 Idaho 550, 916 P.2d 1275 (1996).

RESEARCH REFERENCES

A.L.R. — Tort-feasor's general release of co-tort-feasor as affecting former's right of contribution against co-tort-feasor. 34 A.L.R.3d 1374.

6-807. Limitation on the recovery of damages — Reducing or increasing an award. — (1) In all civil actions in which there has been an award of damages as herein defined, the trial judge may, in his discretion, and after considering all of the evidence, alter such portion of the award

representing damages if the amount awarded; (a) is unsupported or unjustified by the clear weight of the evidence; or (b) is so unreasonably disproportionate to the loss or damage suffered or to be suffered as to be unconscionable or so as to shock the conscience of the court; or (c) is the product of a legal error or mistake during the presentation of the evidence or submission of the case to the trier of fact; or (d) is demonstrated to be more likely than not the product of passion or prejudice on the part of the trier of fact.

(2) If the court finds that the award of damages is unreasonably great or small by reason of any one or more of the factors set forth above, then the district court may exercise its discretion to reduce or increase such award in order to make the same consistent with the losses as shown by the evidence. In the event that the court shall enter any such order, it shall make detailed findings of fact and conclusions of law explaining the reason for its action, the amount of any increase or reduction, and the basis therefore.

History.
I.C., § 6-807, as added by 1987, ch. 278, § 6, p. 571; am. 1992, ch. 86, § 1, p. 270.

STATUTORY NOTES

Compiler's Notes.
Section 19 of S.L. 1987, ch. 278 read: "The provisions of this act are hereby declared to be severable and if any provision of this act or the application of such provision to any person or circumstance is declared invalid for any reason, such declaration shall not affect the validity of remaining portions of this act."

Effective Dates.
Section 18 of S.L. 1987, ch. 278 read: "The provisions of this act shall take effect on July 1, 1987, provided however, that Section [Sections] 1 through 11 shall apply only to causes of action which accrue on and after July 1, 1987. Provided further, that Section 6-1603, Idaho Code, as enacted herein, is hereby repealed and does sunset for causes of action which accrue after June 30, 1992."

Section 2 of S.L. 1992, ch. 86 declared an emergency. Approved March 26, 1992.

JUDICIAL DECISIONS

Motion Properly Denied.
Motion for a new trial or additur by high school girl who had consensual affair with her coach/teacher was properly denied. Because a reasonable jury could have concluded that plaintiffs failed to prove their damages, the jury did not err by failing to award monetary compensation after it found the school district liable for negligent supervision and a proximate cause of the damages, especially since the student offered no evidence of her past medical, counseling, or therapy costs, or of economic loss. Hei v. Holzer, 145 Idaho 563, 181 P.3d 489 (2008).

6-808. Civil immunity for self-defense. — (1) A person who uses force as justified in section 18-4009, Idaho Code, or as otherwise permitted in sections 19-201 through 19-205, Idaho Code, is immune from any civil liability for the use of such force except when the person knew or reasonably should have known that the person against whom the force was used was a law enforcement officer acting in the capacity of his or her official duties.

(2) The court shall award reasonable attorney's fees and costs incurred by the defendant in any civil action if the court finds that the defendant is immune from such action pursuant to this section.

(3) As used in this section, "law enforcement officer" means any court personnel, sheriff, constable, peace officer, state police officer, correctional officer, probation or parole official, prosecuting attorney, city attorney, attorney general, or their employees or agents, or any other person charged with the duty of enforcement of the criminal, traffic or penal laws of this state or any other law enforcement personnel or peace officer as defined in chapter 51, title 19, Idaho Code.

History.
I.C., § 6-808, as added by 2006, ch. 453, § 1, p. 1345.

CHAPTER 9

TORT CLAIMS AGAINST GOVERNMENTAL ENTITIES

SECTION.

6-901. Short title. — This act shall be known and may be cited as the "Idaho tort claims act."

History.
1971, ch. 150, § 1, p. 743.

STATUTORY NOTES

Cross References.

Comparative negligence, § 6-801 et seq.

Death, resignation, removal, or retirement of public officer, effect of cause of action, § 5-319.

Immunity of public officer, § 6-611.

Compiler's Notes.

The words "this act" refer to S.L. 1971, ch. 150, which is compiled as §§ 6-901, 6-902, 6-904, 6-905, 6-906, 6-907 to 6-918, 6-919 to 6-925, 6-927, and 6-928. Probably, the reference should be to "this chapter," being chapter 9, title 6, Idaho Code.

JUDICIAL DECISIONS

ANALYSIS

Disaster Relief.

There is no basis to infer that the Idaho Tort Claims Act applies to the National Guard while engaged in disaster relief activities. The Tort Claims Act does not serve to frustrate the purpose or eliminate the effect of the State Disaster Preparedness Act (see § 46-1001 et seq.) by any stretch of the imagination. Baca v. State, 119 Idaho 782, 810 P.2d 720 (1991).

Inapplicable to Breach of Contract.

Because city's suit against other city, with which it had a contract to have its wastewater treated, was based on other city's breach of a contractual obligation, rather than negligent or wrongful conduct, the Idaho Tort Claims Act was inapplicable and did not bar city's cause of action for breach of contract or render other city immune. City of Chubbuck v. City of Pocatello, 127 Idaho 198, 899 P.2d 411 (1995).

Inapplicable to Nonexistent Torts.

The Idaho Tort Claims Act subjects government entities to liability for negligent or wrongful acts committed by the entity or its employees where a private person would also be liable, but there is no cause of action for negligent investigation in Idaho. Hagy v. State, 137 Idaho 618, 51 P.3d 432 (Ct. App. 2002).

Liability of Police.

There is no duty on a police officer to arrest an intoxicated person who possessed the keys to a vehicle the person might drive, and who had not committed some other crime for which the officer might arrest the person, and police officer not liable in tort to a third person injured when driver attempted to drive himself in the vehicle after officer had returned his keys to him and departed. Olguin v. City of Burley, 119 Idaho 721, 810 P.2d 255 (1991).

State Immunity.

The Tort Claims Act is not a waiver of eleventh amendment immunity. Mazur v. Hymas, 678 F. Supp. 1473 (D. Idaho 1988).

The federal district court did not err when it concluded that the eleventh amendment of the United States Constitution precluded it from asserting jurisdiction over the inmates' claims against the prison officials in their official capacities. Leer v. Murphy, 844 F.2d 628 (9th Cir. 1988).

The immunity granted in § 20-231 is not affected by the tort claims act. Pritchard v. State, 115 Idaho 111, 765 P.2d 136 (1988).

The Idaho Tort Claims Act abrogates the doctrine of sovereign immunity and renders a governmental entity liable for damages arising out of its negligent acts or omissions. However, it preserves the traditional rule of immunity in certain specific situations. Lawton v. City of Pocatello, 126 Idaho 454, 886 P.2d 330 (1994).

Cited in: Tovar v. Billmeyer, 98 Idaho 891, 575 P.2d 489 (1978); Farber v. State, 98 Idaho 928, 576 P.2d 209 (1978); Trosper v. Raymond, 99 Idaho 54, 577 P.2d 33 (1978); Farber v. State, 102 Idaho 398, 630 P.2d 685 (1981); Hopper v. Hayes, 573 F. Supp. 1368 (D. Idaho 1983); Shields v. Martin, 109 Idaho 132, 706 P.2d 21 (1985); Doe v. Durtschi, 110 Idaho 466, 716 P.2d 1238 (1986); Sterling v. Bloom, 111 Idaho 211, 723 P.2d 755 (1986); Wickstrom v. North Idaho College, 111 Idaho 450, 725 P.2d 155 (1986); Walton v. State, 112 Idaho 503, 733 P.2d 724 (1987); Walker v. Shoshone County, 112 Idaho 991, 739 P.2d 290 (1987); Grant v. City of Twin Falls, 113 Idaho 604, 746 P.2d 1063 (Ct. App. 1987); County of Kootenai v. Western Cas. & Sur. Co., 113 Idaho 908, 750 P.2d 87 (1988); Magnuson Props. P'ship v. City of Coeur d'Alene, 138 Idaho 166, 59 P.3d 971 (2002).

RESEARCH REFERENCES

C.J.S. — 81A C.J.S., States, § 467 et seq.
A.L.R. — Tort liability of public schools and institutions of higher learning for accident involving motor vehicle operated by student. 85 A.L.R.5th 301.

6-902. Definitions. — As used in this act:

1. "State" means the state of Idaho or any office, department, agency, authority, commission, board, institution, hospital, college, university or other instrumentality thereof.

2. "Political subdivision" means any county, city, municipal corporation, health district, school district, irrigation district, an operating agent of irrigation districts whose board consists of directors of its member districts, special improvement or taxing district, or any other political subdivision or public corporation. As used in this act, the terms "county" and "city" also mean state licensed hospitals and attached nursing homes established by counties pursuant to chapter 36, title 31, Idaho Code, or jointly by cities and counties pursuant to chapter 37, title 31, Idaho Code.

3. "Governmental entity" means and includes the state and political subdivisions as herein defined.

4. "Employee" means an officer, board member, commissioner, executive, employee, or servant of a governmental entity, including elected or appointed officials, and persons acting on behalf of the governmental entity in any official capacity, temporarily or permanently in the service of the governmental entity, whether with or without compensation, but the term employee shall not mean a person or other legal entity while acting in the capacity of an independent contractor under contract to the governmental entity to which this act applies in the event of a claim.

5. "Bodily injury" means any bodily injury, sickness, disease or death sustained by any person and caused by an occurrence.

6. "Property damage" means injury or destruction to tangible property caused by an occurrence.

7. "Claim" means any written demand to recover money damages from a governmental entity or its employee which any person is legally entitled to recover under this act as compensation for the negligent or otherwise wrongful act or omission of a governmental entity or its employee when acting within the course or scope of his employment.

History.
1971, ch. 150, § 2, p. 743; am. 1976, ch. 309, § 2, p. 1062; am. 1978, ch. 372, § 1, p. 977; am. 1982, ch. 132, § 1, p. 379; am. 1986, ch. 214, § 2, p. 548; am. 1996, ch. 192, § 1, p. 600; am. 2005, ch. 260, § 1, p. 803.

STATUTORY NOTES

Legislative Intent.
Section 1 of S.L. 1976, ch. 309 read: "The legislature of the state of Idaho hereby finds and declares that exposure of public employees to claims and civil lawsuits for acts or omissions within the course or scope of their employment has a chilling effect upon the performance of their employment duties and is an obstacle to the discharge of public business. It is the declared intention of the state of Idaho to relieve public employees from all necessary legal fees and expenses and judgments arising from such claims and civil lawsuits unless the act or omission complained of includes malice or criminal intent. The legislature further declares that the ex-

penditure of public moneys to this end is for a public purpose."

Section 1 of S.L. 1986, ch. 214 read: "The legislature of the state of Idaho declares that it was the intention of the legislature in the original enactment of the Idaho tort claims act to include within the definition of 'political subdivision' agencies and entities, including hospitals and attached nursing homes, whether or not separately incorporated, established by counties and cities to provide for the public health of its citizens. The employees of such facilities, including elected or appointed board members, are entitled to the same protection and subject to the same standards as other employees of governmental entities. The expenditure of public moneys to this end is for a public purpose."

Compiler's Notes.

The words "this act" refer to S.L. 1971, ch. 150, which is compiled as §§ 6-901, 6-902, 6-904, 6-905, 6-906, 6-907 to 6-918, 6-919 to 6-925, 6-927, and 6-928. Probably, the reference should be to "this chapter," being chapter 9, title 6, Idaho Code.

Effective Dates.

Section 3 of S.L. 1982, ch. 132 declared an emergency. Approved March 22, 1982.

JUDICIAL DECISIONS

Analysis

Claim.

The primary function of notice under the Tort Claims Act is to put the governmental entity on notice that a claim against it is being prosecuted, and notice serving that function would not be insufficient unless the governmental entity was misled to its injury. Huff v. Uhl, 103 Idaho 274, 647 P.2d 730 (1982).

Where written estimate given irrigation district by plaintiff did not contain a statement of demand, but the district was clearly apprised of the fact that a claim was being prosecuted against it and of the amount thereof, as confirmed by the activities of both district employee and district's insurance carrier subsequent to plaintiff's delivery of notice, and where there was no evidence that district was misled to its injury by any deficiency in notice, notice of claim was sufficient under the Tort Claims Act. Huff v. Uhl, 103 Idaho 274, 647 P.2d 730 (1982).

A letter from the insurance company representing wrongful death defendants to the city, notifying the city of the claim against the defendants and stating that the city appeared to be responsible, did not constitute notice of a claim by the plaintiffs against the city. Stevens v. Fleming, 116 Idaho 523, 777 P.2d 1196 (1989).

The term "claim," as used in the Idaho Tort Claims Act, describes claims for damages arising from tortious conduct; therefore, plaintiff's claim for the return of property erroneously or illegally seized for the payment of taxes does not appear to fit the definition of a claim for tort damages and is not barred by § 6-904A. Greenwade v. Idaho State Tax Comm'n, 119 Idaho 501, 808 P.2d 420 (Ct. App. 1991).

Where the plaintiff alleged that she had a right to recover damages against the state transportation department because it had "negligently or intentionally secreted, destroyed, lost or mislaid" evidence, her claim for spoliation was a "claim," as defined by the tort claim statute, and her failure to file a notice of tort claim properly resulted in dismissal of her claim. Cook v. State, DOT, 133 Idaho 288, 985 P.2d 1150 (1999).

Employees.

County court clerk, deputy clerk and bailiffs were state employees for the purpose of imposing liability for the alleged negligent destruction of evidence under the Idaho Tort Claims Act, where an administrative judge of the district court, rather than any county official, was the supervisor and controlled the deputy clerks of the court, evidence officer, and bailiffs while performing their judicial clerical functions in the handling and destruction of exhibits. Blankenship v. Kootenai County, 125 Idaho 101, 867 P.2d 975 (1994).

Where there is no evidence that a sheriff from Utah was an employee of an Idaho county in which a third party was injured in an automobile accident during a police chase, the county should be dismissed from the suit, as its liability is only for the actions of its employees. Athay v. Stacey, 146 Idaho 407, 196 P.3d 325 (2008).

Irrigation Districts.

This act was not intended to apply to irrigation districts which operate irrigation systems as a business enterprise for the benefit of shareholders rather than for the welfare of the general public. Brizendine v. Nampa Meridian Irrigation Dist., 97 Idaho 580, 548 P.2d 80 (1976).

Political Subdivision.

A county highway district is a political subdivision entitled to the notice required by § 6-906; thus, the court was correct in granting summary judgment in favor of county highway district in tort action, where plaintiff gave no timely notice of a claim, but merely notified county highway superintendent after the accident that she had not been seriously injured. Curl v. Indian Springs Natatorium, Inc., 97 Idaho 637, 550 P.2d 140 (1976).

Cited in: Haeg v. City of Pocatello, 98 Idaho 315, 563 P.2d 39 (1977); Trosper v. Raymond, 99 Idaho 54, 577 P.2d 33 (1978); Simpson v. Mountain Home Sch. Dist. No. 193, 99 Idaho 845, 590 P.2d 101 (1979); Union Pac. R.R. v. Idaho, 654 F. Supp. 1236 (D. Idaho 1987); Feld v. Idaho Crop Imp. Ass'n, 126 Idaho 1014, 895 P.2d 1207 (1995).

OPINIONS OF ATTORNEY GENERAL

Questions of liability necessarily depend upon particular facts and circumstances. However, under normal circumstances, the Idaho centennial commission will not be liable for contract or tort claims arising from local centennial events. OAG 89-10.

Under normal circumstances, volunteers involved in local centennial events will be protected from personal liability under the Tort Claims Act to the same extent as regular employees of political subdivisions. OAG 89-10.

RESEARCH REFERENCES

A.L.R. — When is federal agency employee independent contractor, creating exception to United States waiver of immunity under Federal Tort Claims Act (28 U.S.C.A. § 2671). 166 A.L.R. Fed. 187.

6-902A. Supervisory physician. — (1) For purposes of this chapter only, a supervisory physician shall be considered an employee.

(2) As used in this section:

(a) "Supervisory duties" means those administrative duties of a physician who supervises personnel affiliated with a licensed ambulance or non-transport service including, but not limited to, disciplining and educating personnel, setting staffing levels, emergency medical services system design, establishing patient care guidelines and medical policies, compliance, establishing standing orders and protocols, reviewing performance of personnel, quality management and other reasonably necessary administrative duties.

(b) "Supervisory physician" means a physician licensed pursuant to chapter 18, title 54, Idaho Code, who supervises the activities of personnel affiliated with a licensed ambulance or non-transport service as described in section 56-1011, Idaho Code, et seq., when the licensed ambulance or non-transport service is operated under the control of a governmental authority.

(3) The exceptions to liability set forth in sections 6-904, 6-904A and 6-904B, Idaho Code, shall not be applicable to a claim against a supervisory physician for failure to properly perform supervisory duties. The liability limit contained in section 6-926, Idaho Code, shall not be applicable to a claim against a supervisory physician for failure to properly perform supervisory duties to the extent that such supervisory physician is covered by liability insurance exceeding that limit.

(4) Claims against a supervisory physician for failure to properly perform supervisory duties shall not be subject to the requirements of chapter 10, title 6, Idaho Code.

History.
I.C., § 6-902A, as added by 2007, ch. 103, § 1, p. 308.

6-903. Liability of governmental entities — Defense of employees. — (a) Except as otherwise provided in this act, every governmental entity is subject to liability for money damages arising out of its negligent or otherwise wrongful acts or omissions and those of its employees acting within the course and scope of their employment or duties, whether arising out of a governmental or proprietary function, where the governmental entity if a private person or entity would be liable for money damages under the laws of the state of Idaho, provided that the governmental entity is subject to liability only for the pro rata share of the total damages awarded in favor of a claimant which is attributable to the negligent or otherwise wrongful acts or omissions of the governmental entity or its employees.

(b) (i) A governmental entity shall provide a defense to its employee, including a defense and indemnification against any claims brought against the employee in the employee's individual capacity when the claims are related to the course and scope of employment, and be responsible for the payment of any judgment on any claim or civil lawsuit against an employee for money damages arising out of any act or omission within the course and scope of his employment; provided that the governmental entity and its employee shall be subject to liability only for the pro rata share of the total damages awarded in favor of a claimant which is attributable to the act or omission of the employee; (ii) provided further, that to the extent there is valid and collectible, applicable insurance or any other right to defense or indemnification legally available to and for the protection of an employee, while operating or using an automobile, aircraft or other vehicle not owned or leased by the governmental entity and while acting within the course and scope of his/her employment or duties, the governmental entity's duty hereunder to indemnify the employee and/or defend any such claim or lawsuit arising out of the operation or use of such personal automobile, aircraft or vehicle, shall be secondary to the obligation of the insurer or indemnitor of such automobile, aircraft or vehicle, whose obligation shall be primary; and (iii) provided further, this paragraph shall not be construed to alter or relieve any such indemnitor or insurer of any legal obligation to such employee or to any governmental entity vicariously liable on account of or legally responsible for damages due to the allegedly wrongful error, omissions, conduct, act or deed of such employee.

(c) The defense of its employee by the governmental entity shall be undertaken whether the claim and civil lawsuit is brought in Idaho district court under Idaho law or is brought in a United States court under federal law. The governmental entity may refuse a defense or disavow and refuse to pay any judgment for its employee if it is determined that the act or omission of the employee was not within the course and scope of his employment or included malice or criminal intent.

(d) A governmental entity shall not be entitled to contribution or indemnification, or reimbursement for legal fees and expenses from its employee unless a court shall find that the act or omission of the employee was outside

the course and scope of his employment or included malice or criminal intent. Any action by a governmental entity against its employee and any action by an employee against the governmental entity for contribution, indemnification, or necessary legal fees and expenses shall be tried to the court in the same civil lawsuit brought on the claim against the governmental entity or its employee.

(e) For the purposes of this act and not otherwise, it shall be a rebuttable presumption that any act or omission of an employee within the time and at the place of his employment is within the course and scope of his employment and without malice or criminal intent.

(f) Nothing in this act shall enlarge or otherwise adversely affect the liability of an employee or a governmental entity. Any immunity or other bar to a civil lawsuit under Idaho or federal law shall remain in effect. The fact that a governmental entity may relieve an employee from all necessary legal fees and expenses and any judgment arising from the civil lawsuit shall not under any circumstances be communicated to the trier of fact in the civil lawsuit.

(g) When a claim asserted against an employee in the employee's individual capacity is dismissed by the court, the dismissed party shall have the right to a hearing pursuant to the provisions of section 12-123, Idaho Code.

History.

I.C., § 6-903, as added by 1976, ch. 309, § 4, p. 1062; am. 1978, ch. 272, § 2, p. 630; am. 1980, ch. 218, § 1, p. 490; am. 1984, ch. 140, § 1, p. 328; am. 2005, ch. 260, § 2, p. 803.

STATUTORY NOTES

Prior Laws.

Former § 6-903, which comprised S.L. 1971, ch. 150, § 3, p. 743, was repealed by S.L. 1976, ch. 309, § 3.

Compiler's Notes.

The words "this act" refer to S.L. 1971, ch. 150, which is compiled as §§ 6-901, 6-902, 6-904, 6-905, 6-906, 6-907 to 6-918, 6-919 to 6-925, 6-927, and 6-928. Probably, the reference should be to "this chapter," being chapter 9, title 6, Idaho Code.

Section 2 of S. L. 1980, ch. 218 read: "This act shall apply to all claims under this act for money damages which accrue or which arise out of any negligent or otherwise wrongful acts or omissions of any governmental entity or its employees occurring on or after July 1, 1980."

JUDICIAL DECISIONS

Analysis

Action against city.
Action against probation officer.
Criminal intent.
Dismissal.
Employee.
Exceptions.
Irrigation districts.
Liberal construction.
Malice.
Motion for summary judgment of dismissal.
Negligent investigations.
Negligent supervision of juveniles.
Notice requirement.
Powers over county roads.
Release from liability.

State employees sued as individuals.
State immunity.
Tort claims authorized.
Trespass action.
Trover action.

Action Against City.

Summary judgment was appropriate as the city owed no legal duty to plaintiff to protect him from illegal fireworks while attending city's fireworks display. Lundgren v. City of McCall, 120 Idaho 556, 817 P.2d 1080 (1991).

Because city's suit against other city, with which it had a contract to have its wastewater treated, was based on other city's breach of a contractual obligation, rather than negligent or wrongful conduct, the Idaho Tort Claims Act was inapplicable and did not bar city's cause of action for breach of contract or render other city immune to suit. City of Chubbuck v. City of Pocatello, 127 Idaho 198, 899 P.2d 411 (1995).

Action Against Probation Officer.

Where a motorcyclist was injured in a collision with a drunk driver who was on probation for driving under the influence of alcohol, the motorcyclist had a cause of action against the driver's probation officer whose negligent supervision of the driver foreseeably created a potential for harm to those motorists whom the driver would encounter on the state's highways. Sterling v. Bloom, 111 Idaho 211, 723 P.2d 755 (1986).

Criminal Intent.

There was no doubt that the defendant teacher, accused of lewd and lascivious acts with his minor students, acted with criminal intent where he admitted to performing the lewd and lascivious acts, he specifically named each of the minor plaintiffs as the objects of his actions, he expressly stated that he acted intentionally, and he pled guilty to related criminal charges of lewd and lascivious conduct. Therefore, the school district was absolved from indemnifying the defendant as a matter of law. Doe v. Durtschi, 110 Idaho 466, 716 P.2d 1238 (1986).

Dismissal.

District court properly dismissed a negligence complaint against the board of professional discipline of the Idaho state board of medicine, because the claimants failed to serve the summons and complaint upon the Idaho secretary of state as well as the Idaho attorney general within six months after filing the complaint and did not show good cause for their failure to do so. Harrison v. Bd. of Prof'l Discipline of the Idaho State Bd. of Med., 145 Idaho 179, 177 P.3d 393 (2008).

Employee.

A Utah sheriff, pursuing an automobile into Idaho with the reasonable belief that the driver had committed a felony in Utah, does not become an employee of the state of Idaho, nor of one of its counties, by the mere fact that law enforcement officers from Idaho joined in the pursuit within the state. Because of the vicarious liability that a governmental entity can have for the acts of its employees, a person cannot become the employee of a governmental entity without its agreement. Athay v. Stacey, 146 Idaho 407, 196 P.3d 325 (2008).

Exceptions.

The Idaho Tort Claims Act is structured in three tiers: The general rule is that governmental entities are liable for damages arising out of their own negligent or otherwise wrongful acts and for those of their employees who were acting within the course and scope of their employment. Section 6-904 then sets out certain exceptions to liability, including an exception for acts such as battery and false imprisonment commonly known as intentional torts. The third tier is also established by § 6-904. It states that the exceptions to liability do not apply if the acts were committed with malice or criminal intent. Grant v. City of Twin Falls, 120 Idaho 69, 813 P.2d 880 (1991).

Irrigation Districts.

This act was not intended to apply to irrigation districts which operate irrigation systems as a business enterprise for the benefit of shareholders rather than for the welfare of the general public. Brizendine v. Nampa Meridian Irrigation Dist., 97 Idaho 580, 548 P.2d 80 (1976).

Liberal Construction.

The Idaho Tort Claims Act is to be construed liberally and with a view to accomplishing its aims and purposes, and attaining substantial justice. Sterling v. Bloom, 111 Idaho 211, 723 P.2d 755 (1986).

Malice.

Where automobile driver's amended complaint alleged that arresting municipal police officers acted with malice, as a matter of law, the driver could not recover from the city, as subsection (c) of this section specifically exempts governmental entities from liability where the employees act with malice. Sprague v. City of Burley, 109 Idaho 656, 710 P.2d 566 (1985).

Where, in an action against governmental entities for violation of the plaintiff's civil rights stemming from his arrest, incarcera-

tion, and physical treatment in the county jail, the amended complaint alleged that the officers acted with malice, the plaintiff could not recover from the city, the county, or the state as a matter of law because the Tort Claims Act exempts entities from liability where the employees act with malice. Herrera v. Conner, 111 Idaho 1012, 729 P.2d 1075 (Ct. App. 1986).

Motion for Summary Judgment of Dismissal.

In considering a motion for summary judgment requesting dismissal of a complaint against a governmental entity and its employees under the Idaho Tort Claims Act, the trial court must answer whether tort recovery is allowed under the laws of Idaho; and, if so, whether an exception to liability found in the tort claims act shields the alleged misconduct from liability; and, if no exception applies, whether the merits of the claim as presented for consideration on the motion for summary judgment entitle the moving party to dismissal. Harris v. State, Dep't of Health & Welfare, 123 Idaho 295, 847 P.2d 1156 (1993).

Negligent Investigations.

Plaintiffs cited no cases from Idaho or any other jurisdiction recognizing the tort of negligent investigation of a crime. Therefore, the summary judgment dismissing plaintiffs' claims of negligent investigation and negligent training of fish and game officers was proper. Wimer v. State, 122 Idaho 923, 841 P.2d 453 (Ct. App. 1992).

Negligent Supervision of Juveniles.

Where there was no evidence to indicate that state employees intentionally and knowingly did or failed to do any act which created an unreasonable risk of harm to victim, as neither juvenile's antecedent behavior nor present comportment presaged the vicious exploits he committed such that a reasonable person could foresee the need to restrain him from society, the department of health and welfare's conduct in supervising the juvenile did not rise to the level of creating an unreasonable risk of harm to the public and, therefore, was not reckless, willful, and wanton. Harris v. State, Dep't of Health & Welfare, 123 Idaho 295, 847 P.2d 1156 (1993).

Notice Requirement.

Since § 6-908 requires the filing of a notice of claim, as a prerequisite to a suit against a governmental employee acting within the course and scope of his employment, and no such claim was filed, the trial court properly dismissed the cause of action against defendants in their individual capacities on the basis of plaintiff's failure to file a notice of claim. Overman v. Klein, 103 Idaho 795, 654 P.2d 888 (1982).

Powers over County Roads.

The powers and duties over county roads granted to county by the legislature satisfy the threshold requirement of subsection (a) of this section. Bingham v. Franklin County, 118 Idaho 318, 796 P.2d 527 (1990).

Release from Liability.

The trial court erred, in ruling as a matter of law, that the department of transportation was not released by agreement between accident victim and driver of car, where department argued that by using the term "persons" in the agreement the parties intended to release the government. Esterbrook v. State, 124 Idaho 680, 863 P.2d 349 (1993).

State Employees Sued as Individuals.

Regardless of plaintiff's contention that defendants were sued as individuals, where complaint was brought against defendants for actions performed by them in their capacity as members of the tax commission, the defendants were sued as state employees for acts or omissions committed within the course and scope of their employment, and pursuant to this section the state had an affirmative duty to furnish legal counsel for the defendants. Conley v. Looney, 117 Idaho 627, 790 P.2d 920 (Ct. App. 1989) (see 2005 amendment of section).

Because the complaint and record contained no evidence, nor allegations, that the defendants acted outside the scope or course of their employment they could not be sued in their individual capacities. Pounds v. Denison, 120 Idaho 425, 816 P.2d 982 (1991) (see 2005 amendment of section).

State Immunity.

The Idaho Tort Claims Act does not constitute a waiver of state immunity. Union Pac. R.R. v. Idaho, 654 F. Supp. 1236 (D. Idaho 1987); Union Pac. R.R. v. Idaho, 663 F. Supp. 75 (D. Idaho 1987).

The Tort Claims Act is not a waiver of eleventh amendment immunity. Mazur v. Hymas, 678 F. Supp. 1473 (D. Idaho 1988).

Tort Claims Authorized.

The Idaho Tort Claims Act authorizes tort claims against governmental entities and employees for their negligence or wrongful acts or omissions when engaged in activities for which an individual could be held liable. Gordon v. Noble, 109 Idaho 1048, 712 P.2d 749 (Ct. App. 1986).

Trespass Action.

An action for trespass to either chattels or land is a tort, as is an action for trover and conversion. When these torts are allegedly committed by a government employee acting within the course or scope of his employment, they fall within the purview of the Idaho Tort Claims Act. Greenwade v. Idaho State Tax

Comm'n, 119 Idaho 501, 808 P.2d 420 (Ct. App. 1991).

Trover Action.

Since conversion is a tortious act, and in the case at issue such act was allegedly committed by a police officer acting within the course or scope of his employment, plaintiff's claim against the officer in trover was within the purview of the Idaho Tort Claims Act. Gordon v. Noble, 109 Idaho 1048, 712 P.2d 749 (Ct. App. 1986).

Cited in: Haeg v. City of Pocatello, 98 Idaho 315, 563 P.2d 39 (1977); Rogers v. State, 98 Idaho 742, 572 P.2d 176 (1977); Elce v. State, 110 Idaho 361, 716 P.2d 505 (1986); Jones v. City of St. Maries, 111 Idaho 733, 727 P.2d 1161 (1986); Barringer v. State, 111 Idaho 794, 727 P.2d 1222 (1986); Walker v. Shoshone County, 112 Idaho 991, 739 P.2d 290 (1987); Ransom v. City of Garden City, 113 Idaho 202, 743 P.2d 70 (1987); County of Kootenai v. Western Cas. & Sur. Co., 113 Idaho 908, 750 P.2d 87 (1988); Udell v. Idaho State Bd. of Land Comm'rs ex rel. Idaho Att'y Gen., 119 Idaho 1018, 812 P.2d 325 (Ct. App. 1991); Thompson v. City of Idaho Falls, 126 Idaho 587, 887 P.2d 1094 (Ct. App. 1994); Feld v. Idaho Crop Imp. Ass'n, 126 Idaho 1014, 895 P.2d 1207 (1995); Crown v. State, Dep't of Agric., 127 Idaho 188, 898 P.2d 1099 (Ct. App. 1994); Brooks v. Logan, 127 Idaho 484, 903 P.2d 73 (1995); Sherer v. Pocatello Sch. Dist. # 25, 143 Idaho 486, 148 P.3d 1232 (2006).

Decisions Under Prior Law

Notice Requirement.

A city's actual notice of plaintiff's damages which resulted from the city's alleged failure to properly operate its municipal water system did not take plaintiff's complaint out of the notice of claim requirements. Calkins v. Fruitland, 97 Idaho 263, 543 P.2d 166 (1975).

OPINIONS OF ATTORNEY GENERAL

A governmental entity, not the division of insurance management, has the duty to defend and indemnify its employees; thus, the question of whether or not the state or other governmental entity has liability insurance has no bearing on the question of whether or not a government employee could be held personally liable for money claim. OAG 86-2.

RESEARCH REFERENCES

Am. Jur. — 57 Am. Jur. 2d, Municipal, County, School, and State Tort Liability, §§ 16 to 46, 92.

C.J.S. — 20 C.J.S., Counties, § 275 et seq.

63 C.J.S., Municipal Corporations, §§ 661, 666 to 873.

78A C.J.S, Schools and School Districts, § 674.

81A C.J.S., States, § 467 et seq.

A.L.R. — Municipal liability for personal injury or death under mob violence or anti-lynching statutes. 26 A.L.R.3d 1142.

Liability of municipal corporation for negligent performance of building inspector's duties. 24 A.L.R.5th 200.

Liability of water supplier for damages resulting from furnishing impure water. 54 A.L.R.3d 936.

Validity and construction of statute authorizing or requiring governmental unit to indemnify public officer or employee for liability arising out of performance of public duties. 71 A.L.R.3d 90.

Liability of municipal corporation for shooting of bystander by law enforcement officer attempting to enforce law. 76 A.L.R.3d 1176.

State or municipal liability for invasion of privacy. 87 A.L.R.3d 145.

Hospital, immunity of state or governmental unit or agency from liability for damages in tort in operating. 18 A.L.R.4th 858.

Immunity of county from liability for damages in tort in operating hospital. 18 A.L.R.4th 858.

Liability for wrongful autopsy. 18 A.L.R.4th 858.

Governmental liability for failure to reduce vegetation obscuring view at railroad crossing or at street or highway intersection. 22 A.L.R.4th 624.

Tort liability of public schools and institutions of higher learning for accident involving motor vehicle operated by student. 85 A.L.R.5th 301.

Liability for spread of fire intentionally set for lawful purpose. 25 A.L.R.5th 391.

6-904. Exceptions to governmental liability. — A governmental entity and its employees while acting within the course and scope of their

employment and without malice or criminal intent shall not be liable for any claim which:

1. Arises out of any act or omission of an employee of the governmental entity exercising ordinary care, in reliance upon or the execution or performance of a statutory or regulatory function, whether or not the statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a governmental entity or employee thereof, whether or not the discretion be abused.

2. Arises out of the imposition or establishment of a quarantine by a governmental entity, whether such quarantine relates to persons or property.

3. Arises out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.

4. Arises out of the activities of the Idaho national guard when engaged in training or duty under sections 316, 502, 503, 504, 505 or 709, title 32, United States Code.

5. Arises out of the activities of the Idaho national guard when engaged in combatant activities during a time of war.

6. Arises out of or results from riots, unlawful assemblies, public demonstrations, mob violence or civil disturbances.

7. Arises out of a plan or design for construction or improvement to the highways, roads, streets, bridges, or other public property where such plan or design is prepared in substantial conformance with engineering or design standards in effect at the time of preparation of the plan or design or approved in advance of the construction by the legislative body of the governmental entity or by some other body or administrative agency, exercising discretion by authority to give such approval.

History.

1971, ch. 150, § 4, p. 743; am. 1974, ch. 167, § 1, p. 1423; am. 1978, ch. 272, § 3, p. 630; am. 1987, ch. 106, § 1, p. 218; am. 1987, ch. 361, § 4, p. 794; am. 1988, ch. 324, § 1, p. 983.

STATUTORY NOTES

Effective Dates.

Section 2 of S.L. 1974, ch. 167 declared an emergency. Approved March 30, 1974.

Section 5 of S.L. 1987, ch. 361 read: "Section 1 of this act shall be in full force and effect on and after July 1, 1988, except for the obligation of the Idaho Transportation Department to promulgate rules and regulations. Sections 2, 3 and 4 of this act shall be in full force and effect on and after July 1, 1987."

JUDICIAL DECISIONS

Analysis

Abuse of process.
Action against probation officer.
Application.
Assault and battery.
Compliance with engineering standards.
Condition of highway.
Department of Transportation.
Design immunity.

Discretionary acts.
Evidence.
Exercise of ordinary care.
Fire inspections.
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Instrumentality of the state.
Intentional tort exception.
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Jury instructions.
Legislative authority.
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Malice.
Malicious prosecution.
Misrepresentation.
Negligent investigations.
Negligent performance of required function.
Parallel functions test.
Pleadings.
Policy decisions.
Removal of vehicle from highway.
Tests to determine exceptions.

Abuse of Process.

The essential elements of abuse of process are: (1) an ulterior, improper purpose; and (2) a wilful act in the use of the process not proper in the regular conduct of the proceeding. Beco Constr. Co. v. City of Idaho Falls, 123 Idaho 516, 865 P.2d 950 (1993).

Action Against Probation Officer.

Where a motorcyclist was injured in a collision with a drunk driver who was on probation for driving under the influence of alcohol, the motorcyclist had a cause of action against the driver's probation officer whose negligent supervision of the driver foreseeably created a potential for harm to those motorists whom the driver would encounter on the state's highways. Sterling v. Bloom, 111 Idaho 211, 723 P.2d 755 (1986) (see § 6-904A).

Application.

The applicability of the Tort Claims Act turns on whether an alleged governmental employee committed a tortious act within the course and scope of his or her employment and whether that employee so acted without malice or criminal intent. Madsen v. Idaho Dep't of Health & Welfare, 114 Idaho 624, 759 P.2d 915 (Ct. App. 1988).

The discretionary function exemption to liability under the Idaho Tort Claimant Act applies only to government decisions entailing planning or policy formation and does not include functions which involve any element of choice, judgment, or ability to make responsible decisions; otherwise every function would fall within the exception. Czaplicki v. Gooding Joint Sch. Dist. No. 231, 116 Idaho 326, 775 P.2d 640 (1989).

In considering a motion for summary judgment requesting dismissal of a complaint against a governmental entity and its employees under the Idaho Tort Claims Act, the trial court has three questions to answer: 1. Is recovery sought on the basis of an alleged tort that exists under the laws of Idaho? 2. If so, as a matter of law, does an exception to liability found in the Tort Claims Act shield the alleged misconduct from liability? 3. If no exception applies, do the merits of the claim as presented for consideration on the motion for summary judgment entitle the moving party to dismissal? Olguin v. City of Burley, 119 Idaho 721, 810 P.2d 255 (1991).

Assault and Battery.

Where, in a tort action against the city for assault and battery committed by police officers, the plaintiff alleged nothing in his affidavit, nor did he testify to anything at his criminal trial, from which one could reasonably infer any ill will on the part of the officers, the district court properly granted the motion for summary judgment as to the assault and battery claim pursuant to subdivision 3 of this section. Anderson v. City of Pocatello, 112 Idaho 176, 731 P.2d 171 (1986).

Compliance with Engineering Standards.

The decision to comply or not to comply with engineering standards is not a discretionary act available to the state. Therefore, as to the walkways at a highway rest area which the district court found were covered by engineering standards, the state was not provided immunity under subdivision 1 of this section, and the district court was required

upon remand to perform the analysis required under subdivision 8 (now subdivision 7) of this section. Estate of Wellard v. State, Dep't of Transp., 118 Idaho 852, 801 P.2d 561 (1990).

The decision to comply with engineering standards is not a discretionary act. Engineering standards must be followed to ensure the safety of the citizens of this state. Burgess v. Salmon River Canal Co., 119 Idaho 299, 805 P.2d 1223 (1991).

Condition of Highway.

In action brought against state by driver injured in accident on narrow bridge, the admission of evidence of design standards adopted after construction of such bridge, and the giving of an instruction indicating that immunity of a public entity may disappear if changed post-conviction conditions create a dangerous condition, were contrary to subdivision 8 (now subdivision 7) of this section and constituted reversible error. Leliefeld v. Johnson, 104 Idaho 357, 659 P.2d 111 (1983).

Subdivision 1 of this section did not immunize the state from liability for failing to place warning signs on a narrow bridge on which accident occurred. Leliefeld v. Johnson, 104 Idaho 357, 659 P.2d 111 (1983).

The state is not immunized from liability when, with respect to a public highway, the state maintains a known dangerous condition on the highway and fails to properly warn motorists of such a condition. Leliefeld v. Johnson, 104 Idaho 357, 659 P.2d 111 (1983).

In an action against the state for wrongful death, injuries, and property damage resulting from an accident on a temporary construction detour, the trial court did not err in concluding that the plan or design of the detour was in substantial conformance with engineering or design standards in effect at the time of the preparation of the plan or design, and any defect in the plan or design was not a proximate cause of the decedent's truck turning over; therefore, the trial court did not err in granting the state's motion for a directed verdict. Elce v. State, 110 Idaho 361, 716 P.2d 505 (1986).

In an action against the Idaho department of transportation brought by parents of a boy killed when hit by a truck along a highway, the department was improperly granted summary judgment and was not immune from liability with regard to the plan or design of the highway, where the questions of fact concerning the advance approval of the design of the highway and conformance to engineering standards were not addressed by the court; if the two requirements of subdivision 8 (now 7) of this section were not met, immunity from liability for the plan and design of the highway will not be available to the department. Bingham v. Idaho Dep't of Transp., 117 Idaho 147, 786 P.2d 538 (1989) (decision prior to 1988 amendment).

The court erroneously determined that it was discretionary for the transportation department to determine the speed limit and place traffic signs and other signals along a highway where a child was hit and killed by a truck; the department is not engaged in activities necessarily immune from liability when it maintains or places pedestrian and vehicle traffic signs and signals along a state highway, because such activities are not a statement of policy to be followed in the future, but the implementation of policy and regulations that have already been determined sometime in the past. Bingham v. Idaho Dep't of Transp., 117 Idaho 147, 786 P.2d 538 (1989) (decision prior to 1988 amendment).

Trial court erred in granting summary judgment to highway district on the question of the district's immunity from liability for flood damage caused when a culvert under the highway collapsed after water was released from an upstream dam; affidavits from two expert witnesses differed as to amount of water the culvert should have been able to carry and there was no evidence as to what the applicable engineering standard was at the time the culvert was built. Burgess v. Salmon River Canal Co., 119 Idaho 299, 805 P.2d 1223 (1991).

Where there was a disputed question of fact over whether or not the escape ramps had been maintained, summary judgment should not have been granted based upon the breach of a duty to maintain them. Freeman v. Juker, 119 Idaho 555, 808 P.2d 1300 (1991).

Department of Transportation.

The state department of transportation has an express statutory duty with respect to erecting and maintaining signs at its highways' intersections; the legislature in no way qualified this duty by the condition that the sign-placing or maintenance activities occur exclusively within boundaries of the state highway system; thus, contrary to the department's position that it was without "jurisdiction" to place and maintain signs outside of its right-of-way, the department had both the authority and an express statutory duty to do so. Roberts v. Reed, 121 Idaho 727, 827 P.2d 1178 (Ct. App. 1991).

Design Immunity.

Under former subdivision 8 of this section (see now subdivision 7), two elements must be satisfied before the governmental entity can avail itself of the design immunity defense: the design of plan had to be in substantial conformance with then existing engineering standards and the plan of design must also have been approved in advance of the construction. Morgan v. State, 124 Idaho 658, 862 P.2d 1080 (1993).

The addition by the legislature of the word "or" to subsection 7 by the 1988 amendment clearly indicates that immunity is available under the provision if the governmental entity shows substantial conformance or advance approval. Therefore, under subsection 7 of this section, as amended, the city was required to establish (1) the existence of a plan or design that was (2) either prepared in substantial conformance with existing engineering or design standards or approved in advance of construction by the legislative or administrative authority. Lawton v. City of Pocatello, 126 Idaho 454, 886 P.2d 330 (1994).

In personal injury action on theory that city was negligent in its design of intersection where accident occurred and that such negligence was a cause of the accident, where after it became clear that the federal funding for implementing certain safety measures was unavailable, changes actually made to the intersection were not incorporated into a written plan but city engineer was directed to proceed with cost-effective improvements to the intersection, such directions would constitute "a plan or design for improvement to the streets," and where there was evidence that the modifications made were in compliance with Manual on Traffic Control Devices, there was sufficient evidence to raise factual questions regarding immunity under subsection 7 of this section and to preclude a directed verdict. Lawton v. City of Pocatello, 126 Idaho 454, 886 P.2d 330 (1994).

Discretionary Acts.

In applying the discretionary function exception to governmental liability, the reviewing court looks to the nature of the conduct in order to determine whether that conduct is planning or operational. If the former is the case, the government is immune even where the planning was negligent; if the latter, immunity is contingent upon the use of due or ordinary care. Sterling v. Bloom, 111 Idaho 211, 723 P.2d 755 (1986).

The discretionary function exception provides immunity to activities which involve the establishment of plans, specifications and schedules where there is room for policy judgment and decision (generally referred to as planning activities), and activities involving the implementation of statutory or regulatory policy (generally referred to as operational activities), so long as those activities are performed with due care. Sterling v. Bloom, 111 Idaho 211, 723 P.2d 755 (1986).

A court must look at the particular conduct alleged in order to determine whether that conduct involved the exercise of discretion. Jones v. City of St. Maries, 111 Idaho 733, 727 P.2d 1161 (1986).

Since the Administrative Procedure Act (see § 67-5201 et seq.) mandates that a state brand inspector shall not accept a fresh brand as proof of ownership absent a certificate or bill of sale covering older brands, there is no room for discretion in implementing this policy directive; accordingly, where the deputy brand board inspector testified that the brands he encountered were "fresh," but he nevertheless did not require further proof of ownership of the cattle, the trial court erred, as a matter of law in dismissing the complaint on the basis of the "discretionary function" exemption of subdivision 1 of this section. Oppenheimer Indus., Inc. v. Johnson Cattle Co., 112 Idaho 423, 732 P.2d 661 (1986).

Discretionary or planning functions of government are exempt from liability in tort, whereas operational functions conducted without "ordinary care" give rise to no governmental immunity; decisions made under statutes and regulations which leave room for policy judgment in their execution are discretionary. Oppenheimer Indus., Inc. v. Johnson Cattle Co., 112 Idaho 423, 732 P.2d 661 (1986).

Wrongful death action against a county for death of an inmate was remanded to determine whether actions by the county employees involved planning or operational decisions and whether the county was entitled to immunity under the discretionary function exception to subdivision 1 of this section. Walker v. Shoshone County, 112 Idaho 991, 739 P.2d 290 (1987).

The discretionary function exception applies to government decisions entailing planning or policy formation. In suits brought under the Tort Claims Act, the "planning/operational" test is used to demarcate decisions involving the formation of basic policy, entitled to immunity, from decisions involving the execution or implementation of that policy, not entitled to immunity. Ransom v. City of Garden City, 113 Idaho 202, 743 P.2d 70 (1987).

Determining the applicability of the discretionary function exception is a two-step process. First, one must examine the nature and quality of the challenged actions. Second, the policies underlying the discretionary function exception must be considered. Ransom v. City of Garden City, 113 Idaho 202, 743 P.2d 70 (1987).

The steps for determining the applicability of discretionary function immunity are as follows: first, the nature and quality of the challenged actions must be examined; routine, everyday matters not requiring evaluation of broad policy factors will more likely than not be "operational", while decisions and actions which involve a consideration of the financial, political, economic and social effects of a given plan or policy will generally be "planning" and fall within the discretionary function exception; second, the policies under-

lying the discretionary function exception must be considered, and the policies are twofold: (1) to permit those who govern to do so without being unduly inhibited in the performance of that function by the threat of liability for tortious conduct, and (2) to limit judicial re-examination of basic policy decisions properly entrusted to other branches of government. Bingham v. Franklin County, 118 Idaho 318, 796 P.2d 527 (1990).

Where the record did not contain a sufficient factual basis to determine whether the district's alleged failure to maintain the escape ramps along steep grade was a discretionary function it seemed likely that the decision of whether or not to build the ramps in the first instance was probably the result of a deliberate decision bound up with the formulation of policy and therefore immune from liability; however, even though there was evidence in the record that some form of maintenance on the ramps was underway just prior to the accident, these facts, without more, were too sparse to enable court to accurately ascertain whether such maintenance, or lack thereof, was a discretionary function. Freeman v. Juker, 119 Idaho 555, 808 P.2d 1300 (1991).

The state department of transportation's determinations whether to place signs warning of the approaching intersection, and its determination whether to erect an enlarged stop sign at the intersection, involved the implementation of the department's policies as set forth in the Manual on Uniform Traffic Control Devices and were not "discretionary" within the meaning of subdivision 1 of this section; accordingly, the department may be held liable if plaintiff can show at trial that it failed to exercise ordinary care. Roberts v. Reed, 121 Idaho 727, 827 P.2d 1178 (Ct. App. 1991).

Where a city's decision when to commence the condemnation of property for street right-of-way was discretionary, the city was immune from tort liability for its negligent failure to acquire landowner's property with reasonable promptness. City of Lewiston v. Lindsey, 123 Idaho 841, 853 P.2d 596 (Ct. App. 1993).

Under subdivision (1) of this section, in determining whether an action is discretionary or optional, the court will first look at the nature of the challenged conduct. Routine matters not requiring evaluation of broad policy factors will likely be "operational," whereas decisions involving a consideration of the financial, political, economic, and social effects of a particular plan are likely "discretionary" and will be accorded immunity. The court will evaluate the challenged conduct in light of the dual policies served by the discretionary function exception: to permit those who govern to do so without being unduly inhibited by the threat of liability and to limit judicial second-guessing of basic policy decisions entrusted to other branches of government. Lawton v. City of Pocatello, 126 Idaho 454, 886 P.2d 330 (1994).

In action against city for injuries resulting from auto accident caused by city's negligent design of intersection, decision to adopt the Traffic Operations Program to Increase Capacity and Safety (TOPICS) report was a discretionary function, as was the decision to recognize and utilize the Manual on Uniform Traffic Control Devices (MUTCD). These decisions, involving a consideration of broad policy factors, were clearly legislative in nature. However, the challenged conduct was the decision not to use a raised median at the site of the accident. This determination involved the routine implementation of the city's pre-determined policies as established by the 1972 TOPICS report or the MUTCD. Since it did not involve basic policy considerations, the decision was not a discretionary function within the meaning of subdivision 1 of this section. Lawton v. City of Pocatello, 126 Idaho 454, 886 P.2d 330 (1994).

Growers' two claims against department of agriculture for failure to disclose shortfall of inspected bean warehouse and for negligent failure to revoke the warehouse's license were properly rejected by the district court under the discretionary function exemption to governmental liability of subdivision 1 of this section and due to the permissive language of §§ 69-227 and 69-228. Crown v. State, 127 Idaho 175, 898 P.2d 1086 (1995).

Whether or not a city ordinance embodies a discretionary planning decision, the city cannot avoid the tort claims act simply by enacting general disclaimers of liability. Municipalities can decide whether or not to undertake particular responsibilities; they cannot define through ordinances the legal consequences of these decisions. To hold otherwise would render the discretionary function exception meaningless. Tomich v. City of Pocatello, 127 Idaho 394, 901 P.2d 501 (1995).

District was immune from liability based upon the discretionary function exception for any failure to implement a suicide prevention program or to train its staff in such prevention. Brooks v. Logan, 127 Idaho 484, 903 P.2d 73 (1995).

The discretionary function exception has dual policy to permit those who govern to do so without being unduly inhibited by the threat of liability and to limit judicial second-guessing of basic policy decisions entrusted to other branches of government. Brooks v. Logan, 127 Idaho 484, 903 P.2d 73 (1995).

Routine matters not requiring evaluation of broad policy factors will likely be "operational," and not subject to immunity, whereas decisions involving a consideration of the fi-

nancial, political, economic, and social effects of a particular plan are likely "discretionary" and will be accorded immunity under exception of Idaho Tort Claims Act. Brooks v. Logan, 127 Idaho 484, 903 P.2d 73 (1995).

Teacher's alleged failure to warn the parents or school authorities about student's journal entries was a decision made solely by the teacher and did not require an evaluation of financial, political, economic and social effects and was an operational decision. Brooks v. Logan, 127 Idaho 484, 903 P.2d 73 (1995).

Where the county issued a permit to allow the owners to build a cabin according to certain plan specifications that were approved by the county building inspector, neither the county nor the building inspector was liable for negligence when it was later determined that the cabin structure did not meet snow load requirements since this section provided the county and the building inspector immunity for negligent acts arising from issuing a permit, and the owners failed to demonstrate that the county or building inspector acted with malice, criminal intent, with gross negligence or with reckless, willful and wanton conduct. Nelson v. Anderson Lumber Co., 140 Idaho 702, 99 P.3d 1092 (Ct. App. 2004).

City had immunity from an apartment building owner's negligence claim for damages caused when sewage flooded his building's basement, since the sewer department supervisor's decision to flush the sewer lines annually was not an operational, every day decision that simply carried out existing policy, but was rather a discretionary function. Dorea Enters. v. City of Blackfoot, 144 Idaho 422, 163 P.3d 211 (2007).

Evidence.

In action by decedent's wife alleging violations of the tort claims act, where conflicting inferences could be drawn from the evidence concerning whether the director, the superintendent and the captain should have reasonably anticipated that the crisis response team would shoot the decedent as a result of the plan and the execution of the plan, and a reasonable person could conclude they should have, court incorrectly granted summary judgment dismissing negligent supervision claim. Kessler v. Barowsky, 129 Idaho 647, 931 P.2d 641 (1997).

Exercise of Ordinary Care.

Where the plaintiffs alleged that the county and county commissioners acted unlawfully when, following adoption of the emergency ordinance, the county and county commissioners entered upon the plaintiffs' property, appropriated the same to the use of the county, and exceeded the authority granted by said ordinance by damaging and destroying the plaintiffs' property, the county and the county commissioners failed to act with ordinary care in the implementation of the local ordinance, and such activity was not subject to immunity under subdivision 1 of this section. Union Pac. R.R. v. Idaho, 654 F. Supp. 1236 (D. Idaho 1987) Union Pac. R.R. v. Idaho, 663 F. Supp. 75 (D. Idaho 1987).

In wrongful death action, by father of child who was murdered by his mother's boyfriend, against department of health and welfare and social worker who had investigated previous child abuse claims made by father, found them to be unfounded, and returned child to mother, neither department nor social worker had immunity because questions of fact existed as to whether they exercised due care. Rees v. State, 143 Idaho 10, 137 P.3d 397 (2006).

Fire Inspections.

Under the "planning/operational test," the city's failure to provide regular fire inspections could only be viewed as the result of governmental decisionmaking and exempt from liability pursuant to subdivision 1 of this section. Lewis v. Estate of Smith, 111 Idaho 755, 727 P.2d 1183 (1986).

Flood Control Districts.

Flood control district was immune from liability to owners of flooded farmland in a negligence suit where their actions, which consisted of shoring up dikes, diverting water and failing to account for incoming flood water from upstream diversions, were characterized as "planning" by the court. Marty v. State, 117 Idaho 133, 786 P.2d 524 (1989).

Impoundment of Vehicle.

Where plaintiff was twice arrested for operating unlicensed motor vehicles and was unable to show proof of ownership to police officer before vehicle was impounded against his will, the jury in an action for damages against the police officer could have concluded that the officer was authorized by § 49-692 (now § 49-662) to impound the vehicle or that, in any event, this section provided him immunity from liability for a wrongful impounding. Gordon v. Noble, 109 Idaho 1048, 712 P.2d 749 (Ct. App. 1986).

In General.

Prior to the abrogation of the sovereign immunity doctrine, generally no right of recovery against the state existed; the right to recover from the state is statutory. Leliefeld v. Johnson, 104 Idaho 357, 659 P.2d 111 (1983).

In ruling on a motion for summary judgment based upon an immunity defense under the Idaho Tort Claims Act (ITCA), a trial judge should first determine whether the plaintiffs' allegations and supporting record generally state a cause of action for which a private person or entity would be liable for

money damages under the laws of the state of Idaho; the court must then determine whether an exception to liability under the ITCA shields the alleged misconduct from liability. Czaplicki v. Gooding Joint Sch. Dist. No. 231, 116 Idaho 326, 775 P.2d 640 (1989).

The Idaho Tort Claims Act is structured in three tiers: The general rule is that governmental entities are liable for damages arising out of their own negligent or otherwise wrongful acts and for those of their employees who were acting within the course and scope of their employment. This section then sets out certain exceptions to liability, including an exception for acts such as battery and false imprisonment commonly known as intentional torts. The third tier states that the exceptions to liability do not apply if the acts were committed with malice or criminal intent. Grant v. City of Twin Falls, 120 Idaho 69, 813 P.2d 880 (1991).

Where, in personal injury action on theory city was negligent in design of intersection where accident occurred, if jury concluded that no plan or design existed and thus city was entitled to immunity under subdivision 7, it would be required to determine if city was entitled to immunity under subdivision 1, under the discretionary function prong of which city was entitled to absolute immunity regarding claims arising from the performance of a discretionary function or the operational prong under which city can be liable if it fails to exercise ordinary care in implementing a pre-established policy. Lawton v. City of Pocatello, 126 Idaho 454, 886 P.2d 330 (1994).

Instrumentality of the State.

District court erred in finding Idaho crop improvement association (ICIA) was an instrumentality of the state and immune from liability for negligent misrepresentation under subdivision 3, because the state did not exercise a great deal of control over ICIA's day-to-day operations which were managed by an executive secretary employed by its board, all but one of its directors were chosen by its members, state did not supervise its internal employment decisions, ICIA received no appropriations from the state and its revenues were not state's, it conducted activities in addition to and separate from its certification program, and had procured its own liability insurance. Duffin v. Idaho Crop Imp. Ass'n, 126 Idaho 1002, 895 P.2d 1195 (1995); Feld v. Idaho Crop Imp. Ass'n, 126 Idaho 1014, 895 P.2d 1207 (1995) (decisions prior to enactment of § 22-1508).

Intentional Tort Exception.

In an action against a school district for negligent retention of a teacher known to be a child molester, the school district was not immune from liability under subdivision 4 of this section; the legislature, by creating an exception to governmental liability for actions arising out of assault and battery, did not intend to relieve state agencies from any duty to safeguard the public from people whom they know to be dangerous. Doe v. Durtschi, 110 Idaho 466, 716 P.2d 1238 (1986).

In order to withstand dismissal under the intentional tort exception to the Tort Claims Act, a plaintiff must allege sufficient facts which, if proven, would demonstrate that the governmental entity should have reasonably anticipated that one of their employees would commit an intentional tort. Doe v. Durtschi, 110 Idaho 466, 716 P.2d 1238 (1986).

Joint Tort Liability.

To the extent that sovereign immunity has been abrogated by the state, it has subjected itself to liability for its negligent acts and the negligent acts of its employees, and to that same extent, the state shares a common liability with third party private tortfeasors. Masters v. State, 105 Idaho 197, 668 P.2d 73 (1983).

Neither the tort claims act nor statutes governing contribution among joint tortfeasors contain any indication that the state is prohibited from obtaining contribution from a joint tortfeasor. Masters v. State, 105 Idaho 197, 668 P.2d 73 (1983).

Where, in personal injury action against state and other defendants, the record showed that the defense of the discretionary function exception to the state's liability was asserted by the state at trial and was resisted by the other defendants, that the ruling of the trial court favored the other defendants, and that no appeal from that ruling was taken by any party, defendants could not argue that state was immune from liability and had acted as volunteer in satisfying judgment and was not, therefore, entitled to contribution. Masters v. State, 105 Idaho 197, 668 P.2d 73 (1983).

Judicial Immunity.

The decision-making of judges must fall within the discretionary function exception in order to afford the insulation necessary for judges to independently carry out their tasks without the fear of consequences. Sterling v. Bloom, 111 Idaho 211, 723 P.2d 755 (1986).

Jury Instructions.

The trial court erred in instructing the jury that violations of certain traffic manual provisions, some of which were not mandatory, were negligence as a matter of law. Esterbrook v. State, 124 Idaho 680, 863 P.2d 349 (1993).

In personal injury action on theory that city was negligent in design of intersection where accident occurred, where jury was instructed that city would be liable if it were negligent in making improvement to intersection area and

if such negligence were a proximate cause of the accident, such instruction was the correct instruction with regard to subdivision 1 of this section. Lawton v. City of Pocatello, 126 Idaho 454, 886 P.2d 330 (1994).

Legislative Authority.

Although the court abrogated the common-law doctrine of governmental tort immunity, the legislature had the constitutional authority to reimpose governmental tort immunity. Haeg v. City of Pocatello, 98 Idaho 315, 563 P.2d 39 (1977).

Legislative Intent.

A basic purpose behind the legislature's creation of a list of exceptions to governmental liability was to limit the effect of its waiver of sovereign immunity with respect to governmental functions. Chandler Supply Co. v. City of Boise, 104 Idaho 480, 660 P.2d 1323 (1983), overruled in part, Sterling v. Bloom, 111 Idaho 211, 723 P.2d 755 (1986).

Malice.

The term "malice" as used in this section means actual malice, which is defined as the intentional commission of a wrongful or unlawful act, without legal justification or excuse and with ill will, whether or not injury was intended. Anderson v. City of Pocatello, 112 Idaho 176, 731 P.2d 171 (1986).

"Malice" within the definition of the Tort Claims Act means actual malice and requires a wrongful act without justification combined with ill will; in an action where it was alleged that sheriff's deputies assaulted and battered plaintiff, the district court properly determined that the deputies had immunity under subdivision 3 of this section, where the record before the district court at the time the summary judgment was granted contained no evidence that the defendants acted with the requisite malice or criminal intent to circumvent the exceptions to liability contained in subdivision 3 of this section. Evans v. Twin Falls County, 118 Idaho 210, 796 P.2d 87 (1990), cert. denied, 498 U.S. 1086, 111 S. Ct. 960, 112 L. Ed. 2d 1048 (1991).

Malicious Prosecution.

Tort claims against a county hospital, including malicious prosecution, libel, and harassment, set out in a counterclaim, could be dismissed as a matter of law. Harms Mem. Hosp. v. Morton, 112 Idaho 129, 730 P.2d 1049 (Ct. App. 1986).

A local government official was entitled to summary judgment in an action for malicious prosecution where the court concluded as a matter of law that his actions at issue fell within the scope of his employment and that the claim against him was therefore barred by the statute. Butler v. Elle, 281 F.3d 1014 (9th Cir. 2002).

Misrepresentation.

Where the state brand board made no misrepresentation to the plaintiff, the misrepresentation exception to the Tort Claims Act did not apply. Oppenheimer Indus., Inc. v. Johnson Cattle Co., 112 Idaho 423, 732 P.2d 661 (1986).

Order of lower court dismissing negligent misrepresentation action filed pursuant to subdivision 3 of this section and against the Idaho crop improvement association (ICIA), a private, nonprofit corporation which had been delegated the responsibility for administering a seed certification program, was affirmed because, except in the narrow confines of a professional relationship involving an accountant, the tort of negligent misrepresentation is not recognized in Idaho. Duffin v. Idaho Crop Imp. Ass'n, 126 Idaho 1002, 895 P.2d 1195 (1995); Feld v. Idaho Crop Imp. Ass'n, 126 Idaho 1014, 895 P.2d 1207 (1995).

Negligent Investigations.

Plaintiffs cited no cases from Idaho or any other jurisdiction recognizing the tort of negligent investigation of a crime. Therefore, the summary judgment dismissing plaintiffs' claims of negligent investigation and negligent training of fish and game officers was proper. Wimer v. State, 122 Idaho 923, 841 P.2d 453 (Ct. App. 1992).

Negligent Performance of Required Function.

When the plaintiff alleges that a government official has negligently acted in not complying with the policy constituted in a statute, regulation, or court order, there is no immunity under the discretionary function exception. Sterling v. Bloom, 111 Idaho 211, 723 P.2d 755 (1986).

Parallel Functions Test.

While regulatory functions clause and the discretionary functions clause of subdivision 1 of this section represent two separate types of actions which may be immune from liability, the "parallel functions" test, i.e., that wherein tort liability would attach to a private person, a governmental entity engaging in the same conduct will be liable, applies to both and neither clause is "mere surplusage." While fewer parallels may exist where a regulatory action is taken than when a discretionary action is taken, the test remains the same. Leliefeld v. Johnson, 104 Idaho 357, 659 P.2d 111 (1983).

There does not exist a "parallel function" exception to liability for unique governmental functions without parallels in the private section under subsection (a) of § 6-903; therefore, if a private person would be liable for the misconduct alleged against the government, so will the government, regardless of whether private individuals ordinarily fill the same

underlying function or role of the government. Sterling v. Bloom, 111 Idaho 211, 723 P.2d 755 (1986).

Pleadings.

Where the plaintiff's pleadings alleged that the city was negligent in inspecting and maintaining fire hydrants and water mains, the pleadings alone failed to establish whether the city's conduct was "planning" or "operational"; accordingly, the judgment of the district court granting the state's motion for dismissal on the pleadings was reversed. Jones v. City of St. Maries, 111 Idaho 733, 727 P.2d 1161 (1986).

Policy Decisions.

The county and county commissioners could not be held liable for the decision to enact an ordinance providing for an escape route from the dam, nor can they be held liable for their decision to wait to enact such an ordinance, even if such policy decisions were negligently made. Union Pac. R.R. v. Idaho, 654 F. Supp. 1236 (D. Idaho 1987); Union Pac. R.R. v. Idaho, 663 F. Supp. 75 (D. Idaho 1987).

Removal of Vehicle from Highway.

The actions of the officer in providing for the removal of a motor vehicle from the public highways did not fall within the discretionary function exception of subdivision 1 of this section. Ransom v. City of Garden City, 113 Idaho 202, 743 P.2d 70 (1987).

Tests to Determine Exceptions.

The planning/operational test provides immunity for planning activities — activities which involve the establishment of plans, specifications and schedules where there is room for policy judgment and decisions. Operational activities — activities involving the implementation of statutory and regulatory policy are not immunized and, accordingly, must be performed with ordinary care. Jones v. City of St. Maries, 111 Idaho 733, 727 P.2d 1161 (1986).

Under the planning/operational test, discretionary governmental policy-making or planning activities are exempt from liability under subdivision 1 of this section, while, operational activities — activities involving the implementation of discretionary statutory and regulatory policy — are not immunized and, accordingly, must be performed with ordinary care. Lewis v. Estate of Smith, 111 Idaho 755, 727 P.2d 1183 (1986).

If, in reliance upon or in the execution or performance of the powers and duties entrusted to it by the state legislature, a county promulgated a policy or plan of road repair and implemented or carried out that plan exercising ordinary care, then operational prong of subdivision 1 of this section would provide immunity to the county. Bingham v. Franklin County, 118 Idaho 318, 796 P.2d 527 (1990).

Cited in: Brooks v. Nez Perce County, 670 F.2d 835 (9th Cir. 1982); United States v. Nez Perce County, 553 F. Supp. 187 (D. Idaho 1982); Merritt v. State, 108 Idaho 20, 696 P.2d 871 (1985); Coeur d'Alene Garbage Serv. v. City of Coeur d'Alene, 114 Idaho 588, 759 P.2d 879 (1988); White v. University of Idaho, 115 Idaho 564, 768 P.2d 827 (Ct. App. 1989); White v. University of Idaho, 118 Idaho 400, 797 P.2d 108 (1990); Limbert v. Twin Falls County, 131 Idaho 344, 955 P.2d 1123 (Ct. App. 1998); Kirkland ex rel. Kirkland v. Blain County Med. Ctr., 134 Idaho 464, 4 P.3d 1115 (2000); Hunter v. State, 138 Idaho 44, 57 P.3d 755 (2002).

OPINIONS OF ATTORNEY GENERAL

None of the exemptions enumerated in § 42-1717 is intended to absolve the water resources board from liability in the event that the board affirmatively announced its intention to exempt particular dams from regulation. OAG 88-2.

The water resources board is not shielded by the immunity provisions of § 42-1717 or the "discretionary function" exception in this section of the Tort Claims Act if it exempts the Mud Lake embankment from the dam safety program; the board has no authority to contract away its statutory duty. OAG 88-2.

Questions of liability necessarily depend upon particular facts and circumstances. However, under normal circumstances, the Idaho centennial commission will not be liable for contract or tort claims arising from local centennial events. OAG 89-10.

Under the authority granted to the Idaho centennial commission, the commission's functions would generally fall within the discretionary function exception of subdivision 1 of this section. OAG 89-10.

School personnel incur no liability for allowing use of school facilities for purposes of child abuse investigation, so long as the reporting was done in good faith and without malice. OAG 93-2.

RESEARCH REFERENCES

A.L.R. — Liability for assault by municipal employee in collecting debt. 22 A.L.R.2d 1232.

Liability of municipality or other governmental unit for failure to provide police protection from crime. 90 A.L.R.5th 273.

Claims arising from governmental conduct causing damage to plaintiff's real property as within discretionary function exception of Federal Tort Claims Act (28 U.S.C.S. § 2680(a)). 167 A.L.R. Fed. 1.

Liability of United States for failure to warn of danger or hazard not directly created by act or omission of federal government and not in national parks as affected by "discretionary function or duty" exception to Federal Tort Claims Act. 169 A.L.R. Fed. 421.

Liability of United States for failure to warn of danger or hazard resulting from governmental act or omission as affected by "discretionary function or duty" exception to Federal Tort Claims Act (28 U.S.C.S. § 2680(a)). 170 A.L.R. Fed. 365.

Liability of United States for failure to warn local police or individuals of discharge, release, or escape of person who is deemed dangerous to public as affected by "discretionary act or duty" exception to Federal Tort Claims Act. 171 A.L.R. Fed. 655.

Claims arising from conduct of governmental employer in administering or failing to administer medical care as within discretionary function exception of Federal Tort Claims Act (28 U.S.C.S. § 2680(a)). 172 A.L.R. Fed. 407.

Liability of United States, under Federal Tort Claims Act (28 U.S.C.S. §§ 1346, 2680), for damages caused by ingestion or administration of government-approved drugs, vaccines, and medications. 173 A.L.R. Fed. 431.

Construction and application of Federal Tort Claims Act (FTCA) exception in 28 U.S.C.S. § 3680(c), concerning claims arising in respect of assessment or collection of any tax or customs duty, or detention of goods or merchandise by any officer of customs or excise or any other law-enforcement officer. 173 A.L.R. Fed. 465.

6-904A. Exceptions to governmental liability. — A governmental entity and its employees while acting within the course and scope of their employment and without malice or criminal intent and without reckless, willful and wanton conduct as defined in section 6-904C, Idaho Code, shall not be liable for any claim which:

1. Arises out of the assessment or collection of any tax or fee.

2. Arises out of injury to a person or property by a person under supervision, custody or care of a governmental entity or by or to a person who is on probation, or parole, or who is being supervised as part of a court imposed drug court program, or any work-release program, or by or to a person receiving services from a mental health center, hospital or similar facility.

History.

I.C., § 6-904A, as added by 1988, ch. 324, § 2, p. 983; am. 2004, ch. 227, § 1, p. 669.

STATUTORY NOTES

Effective Dates.

Section 3 of S.L. 2004, ch. 227 declared an emergency. Approved March 23, 2004.

JUDICIAL DECISIONS

Analysis

Application.
Basis of immunity.
Constitutionality.
Employment status of inmates.
Foreseeability.

Juvenile's release from custody.
Motion for summary judgment.
Negligent supervision.
Negligent supervision of juveniles.
Property erroneously or illegally seized.
Purpose.
Student suicide.
Taxes erroneously or illegally collected.
Unpredictable acts of third persons.

Application.

While both this section and § 63-3074 deal with lawsuits against governmental entities; the Idaho Tort Claims Act (ITCA) (this section) governs procedural issues in tort claims against the state, and there is no reason the ITCA should be applied to limit a taxation statute which allows a cause of action that does not sound in tort. Greenwade v. Idaho State Tax Comm'n, 119 Idaho 501, 808 P.2d 420 (Ct. App. 1991).

Where a probationer raped and killed a young woman whom he met while both worked at a car wash, and the victim's parents sued the state and the car wash for negligence, the parents were not required to show that the state's employee, the probation officer, acted without malice or criminal intent *and* with reckless, willful, and wanton conduct under § 6-904A. Hunter v. State, 138 Idaho 44, 57 P.3d 755 (2002).

Basis of Immunity.

Immunity under this section arises from the status of the person causing the injury, not the status of the person injured. Coonse v. Boise Sch. Dist., 132 Idaho 803, 979 P.2d 1161 (1999).

Constitutionality.

This section is constitutional as it is rationally related to a legitimate governmental end; it protects against ordinary negligence claims which would significantly impair effective governmental process, yet allows fair compensation for egregious wrongs. Harris v. State, Dep't of Health & Welfare, 123 Idaho 295, 847 P.2d 1156 (1993).

Employment Status of Inmates.

Whether inmates are state employees is not dispositive with respect to an analysis under this section, since this section is an immunity provision and does not restrict the state's liability to only those circumstances where an inmate is injured by the acts or omissions of a state employee. Smith v. Board of Cors., 133 Idaho 519, 988 P.2d 1193 (1999).

Foreseeability.

Because the record was devoid of any evidence that the inmate had ever been physically aggressive toward another inmate, the second inmate failed to show how the inmate's attack on him could have been foreseeable to the county, at least at the level of foreseeability contemplated by this section. Farnworth v. Ratliff, 134 Idaho 237, 999 P.2d 892 (2000).

Juvenile's Release From Custody.

Upon his release from the detention center, juvenile was still under the legal custody of the state although released to the possession of his parents, and the state thereby qualified for the immunity afforded by this section. Harris v. State, Dep't of Health & Welfare, 123 Idaho 295, 847 P.2d 1156 (1993).

Motion for Summary Judgment.

In considering a motion for summary judgment requesting dismissal of a complaint against a governmental entity and its employees under the Idaho Tort Claims Act, the trial court must answer whether tort recovery is allowed under the laws of Idaho; and, if so, whether an exception to liability found in the tort claims act shields the alleged misconduct from liability; and, if no exception applies, whether the merits of the claim as presented for consideration on the motion for summary judgment entitle the moving party to dismissal. Harris v. State, Dep't of Health & Welfare, 123 Idaho 295, 847 P.2d 1156 (1993).

Summary judgment was proper where the inmate failed to raise a genuine issue as to the statutory immunity provided to the county officers and, therefore, failed to show he could have succeeded on the underlying action. Farnworth v. Ratliff, 134 Idaho 237, 999 P.2d 892 (2000).

Negligent Supervision.

Summary judgment was improperly granted to school district in case involving injuries sustained by student while participating in activity run by contractor hired by district. While school was immune from damages occurring as a result of ordinary negligence in their supervision of student, this immunity did not extend to damages which may have occurred as a result of district's negligent supervision of the contractor. Sherer v. Pocatello Sch. Dist. # 25, 143 Idaho 486, 148 P.3d 1232 (2006).

Negligent Supervision of Juveniles.

Where there was no evidence to indicate that state employees intentionally and knowingly did or failed to do any act which created an unreasonable risk of harm to victim, as

neither juvenile's antecedent behavior nor present comportment presaged the vicious exploits he committed such that a reasonable person could foresee the need to restrain him from society, the department of health and welfare's conduct in supervising the juvenile did not rise to the level of creating an unreasonable risk of harm to the public and, therefore, was not reckless, willful, and wanton. Harris v. State, Dep't of Health & Welfare, 123 Idaho 295, 847 P.2d 1156 (1993).

Injured student's argument that § 33-512(4) provided some right of relief different from this section failed when the court examined what student claimed the school defendants failed to do in order to fulfill their obligations under that section; student maintained that the school defendants failed to provide adequate hallway monitoring, an indisputably supervisory activity. Mickelsen v. School Dist. No. 25, 127 Idaho 401, 901 P.2d 508 (1995).

This section, which insulates governmental entities and employees from liability arising out of injuries "by a person under supervision, custody or care of a governmental entity," barred the injured student's claim against high school. Mickelsen v. School Dist. No. 25, 127 Idaho 401, 901 P.2d 508 (1995).

Where it was undisputed that the persons who injured the plaintiffs' daughter were students under the supervision of the school district, the allegation of negligent supervision of the injured student, rather than her attackers, did not overcome the immunity afforded by this section, and plaintiff's claim was barred. Coonse v. Boise Sch. Dist., 132 Idaho 803, 979 P.2d 1161 (1999).

No supervisory relationship existed, pursuant to this section, between a school district and a teacher who entered into a consensual sexual relationship with an 18-year-old student so that the school district was not immune from a claim by the student of negligent supervision of the teacher, if the student could point to facts supporting such a claim. However, the school district was shielded by this section from the student's claims against the school district of negligent supervision of the student. Hei v. Holzer, 139 Idaho 81, 73 P.3d 94 (2003).

Property Erroneously or Illegally Seized.

The term "claim," as used in the Idaho Tort Claims Act, see (§ 6-902(7)), describes claims for damages arising from tortious conduct; therefore, plaintiff's claim for the return of property erroneously or illegally seized for the payment of taxes does not appear to fit the definition of a claim for tort damages and, thus, would not be barred by this section. Greenwade v. Idaho State Tax Comm'n, 119 Idaho 501, 808 P.2d 420 (Ct. App. 1991).

Purpose.

The purpose of this section is to limit the liability of governmental entities for injuries caused by those under their supervision, custody, or care. Coonse v. Boise Sch. Dist., 132 Idaho 803, 979 P.2d 1161 (1999).

This section was intended to provide immunity to the state from the unpredictable acts of third persons who are under the custody, supervision and care of the state. Smith v. Board of Cors., 133 Idaho 519, 988 P.2d 1193 (1999).

Student Suicide.

The duty of teacher and school district is simply a duty to exercise reasonable care in supervising students while they are attending school. Therefore, under this section, each was entitled to immunity protection in action brought by parents of high school student who committed suicide. Brooks v. Logan, 130 Idaho 574, 944 P.2d 709 (1997).

Taxes Erroneously or Illegally Collected.

Section 63-3074 does not provide a tort remedy, but provides for the refund of taxes illegally or erroneously collected or for the return of personal property illegally or erroneously seized to satisfy a tax obligation; therefore, an action under § 63-3074 is not impliedly or expressly prohibited by this section. Greenwade v. Idaho State Tax Comm'n, 119 Idaho 501, 808 P.2d 420 (Ct. App. 1991).

Unpredictable Acts of Third Persons.

Subdivision 2 of this section was intended to render the state immune from the unpredictable acts of third persons, including parolees, persons receiving mental counseling or care, or persons under the state's custody, supervision, or care. Harris v. State, Dep't of Health & Welfare, 123 Idaho 295, 847 P.2d 1156 (1993).

RESEARCH REFERENCES

A.L.R. — Liability of municipality or other governmental unit for failure to provide police protection from crime. 90 A.L.R.5th 273.

Claims arising from governmental conduct causing damage to plaintiff's real property as within discretionary function exception of Federal Tort Claims Act (28 U.S.C.S. § 2680(a)). 167 A.L.R. Fed. 1.

Liability of United States for failure to warn of danger or hazard not directly created by act or omission of federal government and not in national parks as affected by "discretionary function or duty" exception to Federal Tort Claims Act. 169 A.L.R. Fed. 421.

Liability of United States for failure to warn of danger or hazard resulting from governmental act or omission as affected by "discretionary function or duty" exception to Fed-

eral Tort Claims Act (28 U.S.C.S. § 2680(a)). 170 A.L.R. Fed. 365.

Liability of United States for failure to warn local police or individuals of discharge, release, or escape of person who is deemed dangerous to public as affected by "discretionary act or duty" exception to Federal Tort Claims Act. 171 A.L.R. Fed. 655.

Claims arising from conduct of governmental employer in administering or failing to administer medical care as within discretionary function exception of Federal Tort Claims Act (28 U.S.C.S. § 2680(a)). 172 A.L.R. Fed. 407.

Liability of United States, under Federal Tort Claims Act (28 U.S.C.S. §§ 1346, 2680), for damages caused by ingestion or administration of government-approved drugs, vaccines, and medications. 173 A.L.R. Fed. 431.

Construction and application of Federal Tort Claims Act (FTCA) exception in 28 U.S.C.S. § 3680(c), concerning claims arising in respect of assessment or collection of any tax or customs duty, or detention of goods or merchandise by any officer of customs or excise or any other law-enforcement officer. 173 A.L.R. Fed. 465.

6-904B. Exceptions to governmental liability. — A governmental entity and its employees while acting within the course and scope of their employment and without malice or criminal intent and without gross negligence or reckless, willful and wanton conduct as defined in section 6-904C, Idaho Code, shall not be liable for any claim which:

1. Arises out of the detention of any goods or merchandise by any law enforcement officer.

2. Arises out of the cancellation or rescission, or the failure to cancel or rescind, any motor vehicle registration and license plates for failure of the owner to verify or maintain motor vehicle liability insurance coverage.

3. Arises out of the issuance, denial, suspension or revocation of, or failure or refusal to issue, deny, suspend, or revoke a permit, license, certificate, approval, order or similar authorization.

4. Arises out of the failure to make an inspection, or the making of an inadequate inspection of any property, real or personal, other than the property of the governmental entity performing the inspection.

5. Arises out of any act or omission providing or failing to provide medical care to a prisoner or person in the custody of any city, county or state jail, detention center or correctional facility.

6. Arises out of a decision of the state commission of pardons and parole or its executive director when carrying out the business of the commission.

7. Arises out of a decision, act or omission of a city, county, the Idaho board of correction or Idaho department of correction when carrying out duties and responsibilities as set forth in chapter 8, title 20, Idaho Code.

8. Arises out of the operation of a sport shooting range as defined in section 6-2701, Idaho Code.

History.

I.C., § 6-904B, as added by 1988, ch. 324, § 3, p. 983; am. 1998, ch. 327, § 3, p. 1055; am. 2001, ch. 335, § 10, p. 1177; am. 2009, ch. 195, § 2, p. 628.

STATUTORY NOTES

Cross References.

Commission of pardons and parole, § 20-210.

Department of correction, § 20-201.

State board of correction, § 20-201A.

Amendments.

The 2009 amendment, by ch. 195, added subsection (8).

JUDICIAL DECISIONS

ANALYSIS

Application.
Gross negligence.
Negligent inspection.

Application.

Evidence presented by growers that department of agriculture (DOA) inspector acted negligently in his inspection of bean warehouse was sufficient to reverse district court's ruling granting summary judgment in favor of DOA, but only as it related to losses incurred prior to July 1, 1988, the effective date of this section and § 6-904C; summary judgment regarding losses incurred after effective date of new sections was proper. Crown v. State, 127 Idaho 175, 898 P.2d 1086 (1995).

Gross Negligence.

Because applicant, who was denied securities license, had failed to disclose the existence of a tax lien against her property, although she did not have actual notice of the lien, and the Idaho department of finance denied her application in the belief that the lien indicated she was insolvent and that she had obtained personal loans from clients in violation of national standards, the department's conduct in denying her application was not "grossly negligent" under the standard of care set forth under this section and § 6-904C. Rincover v. State, Dep't of Fin., 128 Idaho 653, 917 P.2d 1293 (1996).

Negligent Inspection.

Summary judgment was not appropriate on claims that a school district failed to adequately inspect activities provided to students by an independent contractor because the grant of immunity for negligent inspection claims did not apply to claims relating to negligent supervision. Sherer v. Pocatello Sch. Dist. # 25, 143 Idaho 486, 148 P.3d 1232 (2006).

RESEARCH REFERENCES

A.L.R. — Liability of municipality or other governmental unit for failure to provide police protection from crime. 90 A.L.R.5th 273.

Claims arising from governmental conduct causing damage to plaintiff's real property as within discretionary function exception of federal tort claims act (28 U.S.C.S. § 2680(a)). 167 A.L.R. Fed. 1.

Liability of United States for failure to warn of danger or hazard not directly created by act or omission of federal government and not in national parks as affected by "discretionary function or duty" exception to Federal Tort Claims Act. 169 A.L.R. Fed. 421.

Liability of United States for failure to warn of danger or hazard resulting from governmental act or omission as affected by "discretionary function or duty" exception to Federal Tort Claims Act (28 U.S.C.S. § 2680(a)). 170 A.L.R. Fed. 365.

Liability of United States for failure to warn local police or individuals of discharge, release, or escape of person who is deemed dangerous to public as affected by "discretionary act or duty" exception to Federal Tort Claims Act. 171 A.L.R. Fed. 655.

Claims arising from conduct of governmental employer in administering or failing to administer medical care as within discretionary function exception of Federal Tort Claims Act (28 U.S.C.S. § 2680(a)). 172 A.L.R. Fed. 407.

Liability of United States, under Federal Tort Claims Act (28 U.S.C.S. §§ 1346, 2680), for damages caused by ingestion or administration of government-approved drugs, vaccines, and medications. 173 A.L.R. Fed. 431.

Construction and application of Federal Tort Claims Act (FTCA) exception in 28 U.S.C.S. § 3680(c), concerning claims arising in respect of assessment or collection of any tax or customs duty, or detention of goods or merchandise by any officer of customs or excise or any other law-enforcement officer. 173 A.L.R. Fed. 465.

6-904C. Definitions. — For the purposes of this chapter, and this chapter only, the following words and phrases shall be defined as follows:

1. "Gross negligence" is the doing or failing to do an act which a reasonable person in a similar situation and of similar responsibility would, with a minimum of contemplation, be inescapably drawn to recognize his or her duty to do or not do such act and that failing that duty shows deliberate indifference to the harmful consequences to others.

2. "Reckless, willful and wanton conduct" is present only when a person intentionally and knowingly does or fails to do an act creating unreasonable risk of harm to another, and which involves a high degree of probability that such harm will result.

History.
I.C., § 6-904C, as added by 1988, ch. 324, § 4, p. 983.

JUDICIAL DECISIONS

ANALYSIS

Gross negligence.
Reckless, willful and wanton conduct.

Gross Negligence.

Evidence presented by growers that department of agriculture (DOA) inspector acted negligently in his inspection of bean warehouse was sufficient to reverse district court's ruling granting summary judgment in favor of DOA, but only as it related to losses incurred prior to July 1, 1988, the effective date of § 6-904B and this section. Crown v. State, 127 Idaho 175, 898 P.2d 1086 (1995).

Because applicant, who was denied securities license, had failed to disclose the existence of a tax lien against her property, although she did not have actual notice of the lien, and the Idaho department of finance denied her application in the belief that the lien indicated she was insolvent and that she had obtained personal loans from clients in violation of national standards, the department's conduct in denying her application was not "grossly negligent" under the standard of care set forth under this section and § 6-904B. Rincover v. State, Dep't of Fin., 128 Idaho 653, 917 P.2d 1293 (1996).

Genuine issues of material fact precluded summary judgment on an injured passenger's claim that the Idaho division of motor vehicle services was grossly negligent in reinstating the drunk driver's unrestricted license, because a reasonable jury could find that a person with seven DUI convictions was a habitual drunkard and that he would be harmful to the public if allowed to drive. Cafferty v. State, 144 Idaho 324, 160 P.3d 763 (2007).

Reckless, Willful and Wanton Conduct.

Where there was no evidence to indicate that state employees intentionally and knowingly did or failed to do any act which created an unreasonable risk of harm to victim, as neither juvenile's antecedent behavior nor present comportment presaged the vicious exploits he committed such that a reasonable person could foresee the need to restrain him from society, the department of health and welfare's conduct in supervising the juvenile did not rise to the level of creating an unreasonable risk of harm to the public and, therefore, was not reckless, willful, and wanton. Harris v. State, Dep't of Health & Welfare, 123 Idaho 295, 847 P.2d 1156 (1993).

Although affidavits of inmates were deficient in several respects, where portions of those affidavits were based on personal knowledge and established that the inmates worked in a shop with a civilian supervisor who was a state employee, a reasonable inference could be drawn that the supervisor knew of the removal of safety guards from saws and that sufficient admissible evidence existed from which a jury could find that the state's conduct was reckless, willful and wanton. Smith v. Board of Cors., 133 Idaho 519, 988 P.2d 1193 (1999).

Cited in: Farnworth v. Ratliff, 134 Idaho 237, 999 P.2d 892 (2000); Hunter v. State, 138 Idaho 44, 57 P.3d 755 (2002).

6-904D. Exceptions to liability — School districts. [Repealed.]

STATUTORY NOTES

Compiler's Notes.

This section, which comprised I.C., § 6-904D, as added by 1998, ch. 159, § 1, p. 544, was repealed by S.L. 1999, ch. 261, § 1, p. 667, effective July 1, 1999.

6-905. Filing claims against state or employee — Time. — All claims against the state arising under the provisions of this act and all claims against an employee of the state for any act or omission of the employee within the course or scope of his employment shall be presented to and filed with the secretary of state within one hundred eighty (180) days from the date the claim arose or reasonably should have been discovered, whichever is later.

History.

1971, ch. 150, § 5, p. 743; am. 1976, ch. 309, § 5, p. 1062; am. 1985, ch. 136, § 1, p. 372.

STATUTORY NOTES

Compiler's Notes.

The words "this act" refer to S.L. 1971, ch. 150, which is compiled as §§ 6-901, 6-902, 6-904, 6-905, 6-906, 6-907 to 6-918, 6-919 to 6-925, 6-927, and 6-928. Probably, the reference should be to "this chapter," being chapter 9, title 6, Idaho Code.

JUDICIAL DECISIONS

Analysis

Actual notice.
Claim barred.
Compliance.
Computation of filing time.
Constitutionality.
Construction.
Continuing torts.
Equitable tolling.
Notice requirement.
Purpose.
State insurance fund.

Actual Notice.

Where the state had investigated an accident but had no reason to suspect it might be subject to tort claims arising from the accident, the state did not have actual notice of subsequent tort claims against it which rendered literal compliance with notice provisions unnecessary; thus, plaintiffs were required to give timely notice in order to maintain a suit on their claims. Newlan v. State, 96 Idaho 711, 535 P.2d 1348, appeal dismissed, 423 U.S. 993, 96 S. Ct. 419, 46 L. Ed. 2d 367 (1975).

Claim Barred.

Claim against officers who investigated shooting by police officer was precluded by the plaintiff's failure to file a timely notice of claim with the state of Idaho as required by this section. Hopper v. Hayes, 573 F. Supp. 1368 (D. Idaho 1983).

Trial court did not err when it granted summary judgment to the director of the department of correction where a defamation suit was brought against him by an ex-employee who, inter alia, had not first given the necessary notice under the tort claims act. Anderson v. Spalding, 137 Idaho 509, 50 P.3d 1004 (2002).

Compliance.

The fact that parents, whose son died as a result of an automobile accident allegedly caused by the state's use of inappropriate paving materials, were not aware that they had a cause of action against the state until they consulted with their lawyer did not render unnecessary their compliance with the requirement that the tort claim be filed within 120 days (now 180 days) from the date the claim arose, since the parents had knowledge of the facts on the day of the accident. Newlan v. State, 96 Idaho 711, 535 P.2d 1348, appeal dismissed, 423 U.S. 993, 96 S. Ct. 419, 46 L. Ed. 2d 367 (1975).

Where plaintiffs failed to present claim against the state to secretary of state within 120 days (now 180 days) after their alleged cause of action arose, the district court properly dismissed the action under authority of § 6-908. Jacaway v. State, 97 Idaho 694, 551 P.2d 1330 (1976).

Computation of Filing Time.

For purposes of calculating the 120-day (now 180-day) filing limit under this section, the claim against the state in cases of continuing tort is deemed to arise when all of the acts performed pursuant to the contract have been completed, since otherwise it would be difficult for the state to determine the nature or extent of its liability or prepare a defense to any claim, and settlements would either be based on pre-completion, speculative damages or would have to await the completion of the project. Farber v. State, 102 Idaho 398, 630 P.2d 685 (1981).

Plaintiff's argument that she was illiterate in the English language did not change the analysis under this section, and a letter from the insurance adjuster advising plaintiff of the necessity of filing a notice of tort claim, even if plaintiff was unable to read it, was sufficient to put plaintiff on inquiry notice as to the contents of the letter and, under a reasonableness standard, started the running of the statutory notice period. Avila v. Wahlquist, 126 Idaho 745, 890 P.2d 331 (1995).

Constitutionality.

Statutory requirement that tort claims against the state be filed within 120 days (now 180 days) from the day the claim arose or reasonably should have been discovered, though providing for a shorter period than allowed for filing claims against private tortfeasors, does not establish a suspect classification and is not unconstitutionally discriminatory in view of state's legitimate interest in receiving timely notice so that it may investigate the claim. Newlan v. State, 96 Idaho 711, 535 P.2d 1348, appeal dismissed, 423 U.S. 993, 96 S. Ct. 419, 46 L. Ed. 2d 367 (1975); Curl v. Indian Springs Natatorium, Inc., 97 Idaho 637, 550 P.2d 140 (1976).

Construction.

The 120-day (now 180-day) notice provision of this section is not itself a statute of limitation since a separate section, § 6-911, provides for limitation of actions under the Idaho Tort Claims Act; consequently, while rules of construction governing statutes of limitations may prove instructive, they are not determinative of the construction of this section. Farber v. State, 102 Idaho 398, 630 P.2d 685 (1981).

Continuing Torts.

In applying this section to cases of continuing torts caused by projects undertaken pursuant to a contract with the state, the date upon which the project is approved and the contract accepted by the state is the time when the "act" referred to in this section is complete and the 120 days (now 180 days) available for giving notice of a claim begins to run; accordingly, in an action to recover damages for the negligent planning, construction and design of a street reconstruction project, a notice of claim filed 105 days after the date on which construction was completed and the project approved by the state was timely. Farber v. State, 102 Idaho 398, 630 P.2d 685 (1981).

Equitable Tolling.

Even if it were assumed that potential claimant should not have reasonably discovered the basis for his claim prior to July 2006 and that the Idaho Tort Claims Act, § 6-901 et seq., allowed for the tolling of the statute of limitations on the basis of claimant's imprisonment and lack of access to legal materials, applying equitable tolling in this circumstance would not have rendered plaintiff's claim timely. Although plaintiff had access to his legal documents and sufficient Idaho law to begin work on his complaint in September 2007, plaintiff did not file the requisite 180-day notice of a tort claim with the secretary of state until approximately eight months later, in May 2008. Driggers v. Grafe, — Idaho —, 221 P.3d 521 (Ct. App. 2009).

Notice Requirement.

A complaint asserting tort claims against employees of the state department of health and welfare in their official capacities was, in essence, a suit against the state and was properly dismissed for failure to comply with the notice requirements mandated by this section and § 6-908. Overman v. Klein, 103 Idaho 795, 654 P.2d 888 (1982).

The notice of claim requirement of this section serves the purposes of providing an opportunity for parties to resolve their dispute through settlement without resort to the courts, allowing authorities to conduct a timely investigation of the claimant's cause of action to determine the extent of the state's liability, if any, and allowing the state to prepare its defenses. Overman v. Klein, 103 Idaho 795, 654 P.2d 888 (1982).

The language of this section is mandatory and, when it is read together with § 6-908, it is clear that failure to comply with the notice requirement bars a suit. Greenwade v. Idaho State Tax Comm'n, 119 Idaho 501, 808 P.2d 420 (Ct. App. 1991).

Appellant's filing of her grievance did not provide adequate notice of a tort claim against the state; it provided notice that she had a grievance, but did not provide notice that she intended to go a step farther by bringing a tort claim. Pounds v. Denison, 120 Idaho 425, 816 P.2d 982 (1991).

An insurance company's awareness of an accident or medical expenses does not relieve a claimant of the burden to file a timely notice of tort claim under § 6-908 and this section with the appropriate governmental entity in

accordance with the provisions of § 6-907. Avila v. Wahlquist, 126 Idaho 745, 890 P.2d 331 (1995).

Where the plaintiff alleged that she had a right to recover damages against the state transportation department because it had "negligently or intentionally secreted, destroyed, lost or mislaid" evidence, her claim for spoliation was a "claim" as defined by the tort claim statute, and her failure to file a notice of tort claim properly resulted in dismissal of her claim. Cook v. State, DOT, 133 Idaho 288, 985 P.2d 1150 (1999).

District court improperly dismissed as untimely prisoner's pro se civil complaint, because document that he submitted within the limitations period sufficed as a complaint, in that it: (1) alleged the essential facts to state a claim that he was entitled to relief; (2) explicitly stated that he had already complied with the notice requirements; and (3) while captioned as a "tort claim," characterized the attached filing as a "complaint/claim," in part employing language commonly used to signal the intended commencement of a civil complaint. Hauschulz v. State, 143 Idaho 462, 147 P.3d 94 (Ct. App. 2006).

Purpose.

The purposes of this section are to (1) save needless expense and litigation by providing an opportunity for the amicable resolution of the differences between parties, (2) allow authorities to conduct a full investigation into the cause of the injury in order to determine the extent of the state's liability, if any, and (3) allow the state to prepare defenses. Farber v. State, 102 Idaho 398, 630 P.2d 685 (1981).

State Insurance Fund.

Where the plaintiffs conceded that the state insurance fund was a state agency when they filed their notice of tort claim, it was inconsistent for them then to argue that it was not a state agency for the purpose of a claim against the state. Kelso v. Lance, 134 Idaho 373, 3 P.3d 51 (2000).

Cited in: Farber v. State, 98 Idaho 928, 576 P.2d 209 (1978); Caldwell Mem. Hosp. v. Board of County Comm'rs, 107 Idaho 33, 684 P.2d 1010 (Ct. App. 1984); Madsen v. Idaho Dep't of Health & Welfare, 114 Idaho 624, 759 P.2d 915 (Ct. App. 1988); Curtis v. Firth, 123 Idaho 598, 850 P.2d 749 (1993); Feld v. Idaho Crop Imp. Ass'n, 126 Idaho 1014, 895 P.2d 1207 (1995); Rodriguez v. Department of Corr., 136 Idaho 90, 29 P.3d 401 (2001).

RESEARCH REFERENCES

C.J.S. — 81A C.J.S., States, § 467 et seq.

6-906. Filing claims against political subdivision or employee — Time. — All claims against a political subdivison [subdivision] arising under the provisions of this act and all claims against an employee of a political subdivision for any act or omission of the employee within the course or scope of his employment shall be presented to and filed with the clerk or secretary of the political subdivision within one hundred eighty (180) days from the date the claim arose or reasonably should have been discovered, whichever is later.

History.

1971, ch. 150, § 5, p. 743; am. 1976, ch. 309, § 6, p. 1062; am. 1985, ch. 136, § 2, p. 372.

STATUTORY NOTES

Cross References.

Damage claim against city, § 50-219.

Compiler's Notes.

The words "this act" refer to S.L. 1971, ch. 150, which is compiled as §§ 6-901, 6-902, 6-904, 6-905, 6-906, 6-907 to 6-918, 6-919 to 6-925, 6-927, and 6-928. Probably, the reference should be to "this chapter," being chapter 9, title 6, Idaho Code.

The bracketed word "subdivision" was inserted by the compiler.

JUDICIAL DECISIONS

Analysis

Accrual of Cause of Action.

Knowledge of facts which would put a reasonably prudent person on inquiry is the equivalent to knowledge of the wrongful act and will start the running of the 120-day (now 180-day) period. McQuillen v. City of Ammon, 113 Idaho 719, 747 P.2d 741 (1987).

The statutory period within which all claims against a political subdivision must be filed begins to run from the occurrence of the wrongful act, even though the full extent of damages may be unknown or unpredictable at that time. McQuillen v. City of Ammon, 113 Idaho 719, 747 P.2d 741 (1987).

A claimant "discovers" his claim against the governmental entity only when he becomes fully apprised of the injury or damage and of the governmental entity's role. The question of when the claimant reasonably should have discovered the governmental entity's role is a question of material fact which, if genuinely disputed, is inappropriate for determination on a motion for summary judgment. Carman v. Carman, 114 Idaho 551, 758 P.2d 710 (Ct. App. 1988).

Action Against County.

In wrongful death action, material issue of fact existed as to whether claim against county filed more than 120 days (now 180 days) after date of accident was filed within 120 days (now 180 days) from date claim reasonably should have been discovered which rendered issue inappropriate for determination on a motion for summary judgment. Trosper v. Raymond, 99 Idaho 54, 577 P.2d 33 (1978).

Where appellant, injured due to lack of a warning sign when he crossed the border from one county into another and the paved road turned to gravel, failed to file a notice of tort claim against the proper county within the 180 day time frame specified by this section and § 6-908, his claim was prohibited. Kramer v. Central Hwy. Dist., 126 Idaho 722, 889 P.2d 1112 (1995).

Appellant's contention that the tort claim notices sent to two neighboring counties should have served to put the county at issue on notice that a claim against it was being prosecuted, since the attorney for Idaho county reciprocal management program (ICRMP), which was the liability insurer for all three counties involved, was agent of the county at issue was held by the supreme court to be without merit as the county at issue cannot be charged with notice of a claim against it merely because the attorney for the ICRMP became aware of claims asserted against neighboring counties. Kramer v. Central Hwy. Dist., 126 Idaho 722, 889 P.2d 1112 (1995).

Action Against Highway District.

A county highway district is a political subdivision entitled to the notice required by this section; thus the district court was correct in granting summary judgment in favor of county highway district in tort action, where plaintiff gave no timely notice of a claim but merely notified county highway superintendent after the accident that she had not been seriously injured. Curl v. Indian Springs Natatorium, Inc., 97 Idaho 637, 550 P.2d 140 (1976).

Action Against Minor.

Section 5-230, providing for tolling of statutes of limitation against minors, serves to toll the time for filing a notice of claim under this section. Gailey v. Jerome County, 113 Idaho 430, 745 P.2d 1051 (1987) (see § 6-906A).

Action Against Municipality.

Where plaintiff was fully aware of his claim against defendant-municipality on the date he was attacked and injured within its boundaries and its chief of police failed to come to his assistance, the 120-day (now 180-day) limitation period began to run on that date, even though additional injuries were discovered after the limitation period had expired. Ralphs v. City of Spirit Lake, 98 Idaho 225, 560 P.2d 1315 (1977).

District court properly granted a city summary judgment, in connection with a property owner's action against it because the owner failed to file notice of its claim within 180 days of learning of the claim, which was when the city sent the owner a letter in which it refused to pay for work the owner completed; the court refused to consider the owner's issue of whether § 50-219 applied to the owner's equitable claims because the issue was not properly raised in the lower court, but the court noted that it had construed § 50-219 to require a claimant to file notice of all claims for damages against a governmental entity, tort or otherwise, as directed by the Idaho Tort Claims Act. Magnuson Props. P'ship v. City of Coeur d'Alene, 138 Idaho 166, 59 P.3d 971 (2002).

Where developer did not file notice of a claim of unjust enrichment against a city, regarding contruction of a water supply line to a new subdivision, until almost one year after he had completed the construction, his claim was not timely under § 50-219 and this section. Scott Beckstead Real Estate Co. v. City of Preston, 147 Idaho 852, 216 P.3d 141 (2009).

Action Against School District.

The notice of claims required by the tort claims act applies to actions brought against an independent school district which operates by virtue of a charter from the legislature. Independent Sch. Dist. v. Callister, 97 Idaho 59, 539 P.2d 987 (1975), disapproved on other grounds, Larson v. Emmett Joint Sch. Dist. No. 221, 99 Idaho 120, 577 P.2d 1168 (1978).

Amended Complaint.

An Idaho Tort Claims Act claim that was contained in an amended complaint was incorrectly ruled to relate back to original complaint and should not have been denied as premature. Farnworth v. Femling, 125 Idaho 283, 869 P.2d 1378, cert. denied, 513 U.S. 816, 115 S. Ct. 73, 130 L. Ed. 2d 28 (1994).

Civil Rights Actions.

A state's notice-of-claim statute which provides that no action may be brought or maintained against a state government subdivision unless claimant provides written notice within a certain period of time is preempted when a federal civil rights action is brought in state court. Sweitzer v. Dean, 118 Idaho 568, 798 P.2d 27 (1990).

Condition Precedent.

Suit seeking monetary damages brought by property owner challenging denial of conditional use permit to operate an adult bookstore and theater in area zoned "commercial central" by city council was correctly dismissed where plaintiff did not meet condition precedent by presenting his claims against the city within 120 days (now 180 days) after his cause of action arose. Tovar v. Billmeyer, 98 Idaho 891, 575 P.2d 489 (1978).

Compliance with the tort claims act's notice requirements is a condition precedent to bringing a suit under that act. Smith v. City of Preston, 99 Idaho 618, 586 P.2d 1062 (1978).

Effect of 1985 Amendment.

The 1985 amendment of this section extending the time for filing claims under the Tort Claims Act did not apply retroactively. Gailey v. Jerome County, 113 Idaho 430, 745 P.2d 1051 (1987).

Excusing Incapacity.

Giving of notice within a reasonable time, not exceeding 120 days (now 180 days) after removal of an incapacity is compliance with the statutory requirement. Larson v. Emmett Joint Sch. Dist. No. 221, 99 Idaho 120, 577 P.2d 1168 (1978).

Where a claimant is unconscious or hospitalized the entire statutory period, whether or not such incapacity is sufficient to be considered as an "excusing incapacity," thus excusing her from compliance with the 120 day (now 180 day) filing requirement, should be determined first by the jury on a case by case basis to ascertain if the incapacity was sufficient to excuse compliance and secondly to ascertain how long the claimant's physical and mental capacity served to toll the beginning of the 120 day (now 180 day) statutory period for filing notice. Larson v. Emmett Joint Sch. Dist. No. 221, 99 Idaho 120, 577 P.2d 1168 (1978).

Section 6-907 provides an alternative method of complying with the time limitations of this section but does not impose an additional burden on claimant to prove he was too incapacitated to communicate with those around him or was totally isolated from and bereft of any supporting friends and relatives. Larson v. Emmett Joint Sch. Dist. No. 221, 99 Idaho 120, 577 P.2d 1168 (1978).

Failure to File Claim.

Where, in an action to recover damages resulting from a condemnation proceeding, the claims against the defendants were based on their official actions as employees of the city, and the plaintiffs did not file a tort claim with the city, the plaintiffs were barred from pursuing a cause of action against the defendants. Anderton v. Herrington, 113 Idaho 73, 741 P.2d 360 (Ct. App. 1987).

Where plaintiff failed to file his claim against the county within the time limits proscribed by the act, supreme court held that the fact that appellant had photographs of the accident scene which picture a sign stating "Entering Nez Perce County," as well as the fact that plaintiff or his representatives could have determined within minimal effort that part of the road in question was in Nez Perce county was sufficient to show that plaintiff knew or reasonably should have known within the first seven months of the accident what counties were potentially involved in his tort claim. Kramer v. Central Hwy. Dist., 126 Idaho 722, 889 P.2d 1112 (1995).

The plaintiff did not file a notice of tort claim because he believed he was negotiating with the defendant hospital and that it was not necessary, but this was not a sufficient basis under the doctrine of promissory estoppel for failing to file the required notice, and, therefore, promissory estoppel did not waive the requirement of filing a notice of tort claim with the defendant hospital on or before the 180-day deadline. Mitchell v. Bingham Mem. Hosp., 130 Idaho 420, 942 P.2d 544 (1997).

In General.

Statement to city housing authority by claimant's son-in-law that he believed authority was responsible for claimant's injuries caused when she fell on ice in authority's parking lot neither contained the information required for valid and sufficient notice under § 6-907, nor constituted a claim filed under the provisions of this section. Friel v. Boise City Hous. Auth., 126 Idaho 484, 887 P.2d 29 (1994).

The medical malpractice prelitigation statutes do not preempt application of the Idaho Tort Claims Act because both statutes are specific and serve different purposes. Mitchell v. Bingham Mem. Hosp., 130 Idaho 420, 942 P.2d 544 (1997).

No Exemption From Compliance.

In actions against governmental entities, plaintiffs are not exempt from the notice of claim requirements because of minority, substantial actual notice having been given, or because of the relative size of the governmental units. Independent Sch. Dist. v. Callister, 97 Idaho 59, 539 P.2d 987 (1975), disapproved on other grounds, Larson v. Emmett Joint Sch. Dist. No. 221, 99 Idaho 120, 577 P.2d 1168 (1978).

Though minors and those suffering incapacities were not intended to be exempted from notice of claim requirements, minority and incapacitation are factors which may be considered in deciding whether a claim reasonably should have been discovered. Independent Sch. Dist. v. Callister, 97 Idaho 59, 539 P.2d 987 (1975), disapproved on other grounds, Larson v. Emmett Joint Sch. Dist. No. 221, 99 Idaho 120, 577 P.2d 1168 (1978).

The language of § 50-219 requires that a claimant must file a notice of claim for all damage claims, tort or otherwise, as directed by the filing procedures set forth in this section. Sweitzer v. Dean, 118 Idaho 568, 798 P.2d 27 (1990).

The plaintiffs were aware of the overdose and respiratory arrest on the day the overdose occurred and the facts available to the plaintiffs were sufficient to cause a reasonably prudent person to inquire further into the surrounding circumstances, and the 180-day period under this section began to run on the day of the overdose, even though the plaintiffs did not know the extent of the injury and damages or the extent to which the defendant was responsible. Mitchell v. Bingham Mem. Hosp., 130 Idaho 420, 942 P.2d 544 (1997).

Notice.

—Actual.

A city's actual notice of plaintiff's damages which resulted from the city's alleged failure to properly operate its municipal water system did not take plaintiff's complaint out of the notice of claim requirements. Calkins v. Fruitland, 97 Idaho 263, 543 P.2d 166 (1975).

In actions against governmental entities, plaintiffs are not exempt from the notice of claim requirements because of substantial actual notice having been given. McQuillen v. City of Ammon, 113 Idaho 719, 747 P.2d 741 (1987).

—Exclusion.

In excluding the use of the tort claim notices as prior inconsistent statements, the trial court's reasoning that, because the purpose of a tort claim notice is merely to give notice not to assert liability, it carries even less evidentiary weight than the pleadings of a complaint, and its conclusion that the probative value of the tort claim notices was substantially outweighed by their potential to confuse or mislead the jury, properly called for exercise of trial court's discretion. Burgess v. Salmon River Canal Co., 127 Idaho 565, 903 P.2d 730 (1995).

—In General.

In plaintiff's suit against an independent school district for damages resulting from

personal injuries suffered during school hours, plaintiff's argument that the statutory notice of claim is not required when recovery is sought from the liability carrier of the governmental entity was without merit. Independent Sch. Dist. v. Callister, 97 Idaho 59, 539 P.2d 987 (1975), disapproved on other grounds, Larson v. Emmett Joint Sch. Dist. No. 221, 99 Idaho 120, 577 P.2d 1168 (1978).

Since an insurer's subrogation claim is derived from and dependent upon successful prosecution of the insured's claim, notice by a motorist's insurance carrier of a subrogation claim was therefore necessarily also notice of the motorist's claim upon which the subrogation request was founded. Smith v. City of Preston, 99 Idaho 618, 586 P.2d 1062 (1978).

The supreme court has consistently taken a liberal approach to interpreting the notice requirement of the Tort Claims Act. Doe v. Durtschi, 110 Idaho 466, 716 P.2d 1238 (1986).

Compliance with the Tort Claims Act's notice requirement is a mandatory condition precedent to bringing suit, the failure of which is fatal to a claim, no matter how legitimate. McQuillen v. City of Ammon, 113 Idaho 719, 747 P.2d 741 (1987).

The 120-day (now 180-day) notice provision of the Tort Claims Act is not itself a statute of limitations; § 6-911 provides for the limitation of actions thereunder. The notice requirement is in addition to the applicable statute of limitations. McQuillen v. City of Ammon, 113 Idaho 719, 747 P.2d 741 (1987).

District court erred in dismissing negligence claim against hospital on the basis that plaintiff's notice of claim was untimely without identifying the specific alleged wrongful act or ommission on the part of the hospital. The alleged negligence or wrongful act or omission must be identified before the court can determine when the claim reasonably should have been discovered. Steele v. Kootenai Med. Ctr., 142 Idaho 919, 136 P.3d 905 (2006).

In malpractice suit, trial court properly denied patient's motion to reconsider grant of summary judgment in favor of hospital. Newly-discovered evidence that showed hospital had received copy of patient's letter informing the Idaho state board of medicine (ISBM) of his malpractice claim did not constitute adequate notice and would not have changed the trial court's summary judgment ruling. The patient could not rely on the ISBM's forwarding of his letter to the hospital to establish notice where he had no special relationship with the ISBM. Foster v. Kootenai Med. Ctr., 143 Idaho 425, 146 P.3d 691 (Ct. App. 2006).

Defendant sheriff, deputy sheriff, prosecutor, and deputy prosecutor were entitled to summary judgment on plaintiff's malicious prosecution claims because the plaintiff had not provided a formal, written notice of claim as required by this section. Frost v. Robertson, 2009 U.S. Dist. LEXIS 24006 (D. Idaho 2009).

—Sufficiency.

The primary function of notice under the Tort Claims Act is to put the governmental entity on notice that a claim against it is being prosecuted, and notice serving that function would not be insufficient unless the governmental entity was misled to its injury. Huff v. Uhl, 103 Idaho 274, 647 P.2d 730 (1982).

Where written estimate given irrigation district by plaintiff did not contain a statement of demand, but the district was clearly apprised of the fact that a claim was being prosecuted against it and of the amount thereof, as confirmed by the activities of both district employee and district's insurance carrier subsequent to plaintiff's delivery of notice, and where there was no evidence that district was misled to its injury by any deficiency in notice, notice of claim was sufficient under the Tort Claims Act. Huff v. Uhl, 103 Idaho 274, 647 P.2d 730 (1982).

As long as the notice is delivered to the secretary's office, it is sufficient. Huff v. Uhl, 103 Idaho 274, 647 P.2d 730 (1982).

Notice to an insurer of a public entity can in certain circumstances constitute substantial compliance with a Tort Claims Act notice requirement. Sysco Intermountain Food Serv. v. City of Twin Falls, 109 Idaho 88, 705 P.2d 548 (Ct. App. 1985).

Court improperly granted city's motion for summary judgment on ground that plaintiff had failed to timely file a written tort claim notice with the city within 120 days' (now 180 days') limit where plaintiff, immediately after the collision between plaintiff's and defendant city's vehicles, orally had notified city's insurance agent of a claim and the agent accepted the claim and referred it to the city's insurance carrier who investigated the claim and denied it by means of a telephone call to the plaintiff. Sysco Intermountain Food Serv. v. City of Twin Falls, 109 Idaho 88, 705 P.2d 548 (Ct. App. 1985).

A letter from the insurance company representing wrongful death defendants to the city, notifying the city of the claim against the defendants and stating that the city appeared to be responsible, did not constitute notice of a claim by the plaintiffs against the city. Stevens v. Fleming, 116 Idaho 523, 777 P.2d 1196 (1989).

Claimant's oral notice to city housing authority of a potential insurance claim was not adequate notice under this section and § 6-907 of a tort claim. Friel v. Boise City Hous. Auth., 126 Idaho 484, 887 P.2d 29 (1994).

Where the plaintiff did not file a formal

written notice of tort claim with a hospital, his written communication of his damages to the hospital's insurance adjuster did not constitute substitution of direct notice to the governmental entity, since the insurance carrier concerned was the hospital's, not the plaintiff's, and there was no special relationship between that insurance carrier and the plaintiff. Blass v. County of Twin Falls, 132 Idaho 451, 974 P.2d 503 (1999).

—Timely.

The general tolling provision, § 5-230, applies to all procedures integral to commencing actions against private or public defendants, including the notice procedure of this section. Consequently, subdivision 1 of § 5-230 tolled the running of the time within which this section required the minor plaintiffs to give notice to the school district, and the notice given on their behalf was adequate as a matter of law. Doe v. Durtschi, 110 Idaho 466, 716 P.2d 1238 (1986) (see § 6-906A).

The 120-day (now 180-day) limit begins to run after the claimant becomes fully apprised of not only the injury or damages, but also the governmental entity's role. Doe v. Durtschi, 110 Idaho 466, 716 P.2d 1238 (1986) (decision prior to 1985 amendment).

Where, in an action against a school district for negligent retention of a teacher known to be a child molester, the plaintiffs asserted that during a pre-sentence investigation of the teacher, they discovered that the school district had retained the teacher even after knowing of his illicit tendencies and they then filed their claims in less than 120 days (now 180 days), notice for the adult plaintiffs' claims was entirely adequate. Doe v. Durtschi, 110 Idaho 466, 716 P.2d 1238 (1986) (decision prior to 1985 amendment).

In an action for damages caused by the city's wrongful issuance of stop-work orders and a temporary injunction against the plaintiff's continued construction of its apartment complex, the wrongs occasioned by the city were of a continuing nature, but ceased when the temporary injunction and stop-work orders were lifted by the court order; therefore, the plaintiff's filing of its notice of claim was not timely where it was filed more than 120 days after the court order was issued. Intermountain W., Inc. v. Boise City, 111 Idaho 878, 728 P.2d 767 (1986) (decision prior to 1985 amendment).

Beginning October 15, 2008, when another state is a defendant in a tort action brought in an Idaho court, once the proper choice of law is made, based upon the "most significant relation" test, the deadline for filing notice of a claim with a state or political subdivision will be governed by that jurisdiction's laws. Athay v. Stacey, 146 Idaho 407, 196 P.3d 325 (2008).

Nuisance Claim.

Trial court improperly granted a city's motion to dismiss a suit brought by property owners alleging tort claims arising out of problems associated with an adjacent, unpaved road; the speeding cars and the dust caused by the road were continuous so the limitations period provided in the Idaho Tort Claims Act (ITCA) was not applicable, and the property owners should have been allowed to amend their complaint to include a claim for nuisance, which was not governed by the ITCA. Cobbley v. City of Challis, 138 Idaho 154, 59 P.3d 959 (2002).

Purpose.

The purpose of the Tort Claims Act is to (1) save needless expense and litigation by providing an opportunity for amicable resolution of the differences between parties, (2) allow authorities to conduct a full investigation into the cause of the injury in order to determine the extent of the state's liability, if any, and (3) allow the state to prepare defenses. Friel v. Boise City Hous. Auth., 126 Idaho 484, 887 P.2d 29 (1994).

Cited in: Brizendine v. Nampa Meridian Irrigation Dist., 97 Idaho 580, 548 P.2d 80 (1976); Farber v. State, 98 Idaho 928, 576 P.2d 209 (1978); Farber v. State, 102 Idaho 398, 630 P.2d 685 (1981); Harkness v. City of Burley, 110 Idaho 353, 715 P.2d 1283 (1986); Harms Mem. Hosp. v. Morton, 112 Idaho 129, 730 P.2d 1049 (Ct. App. 1986); Walker v. Shoshone County, 112 Idaho 991, 739 P.2d 290 (1987); Thompson v. City of Idaho Falls, 126 Idaho 587, 887 P.2d 1094 (Ct. App. 1994); J.P. Stravens Planning Assocs. v. City of Wallace, 129 Idaho 542, 928 P.2d 46 (Ct. App. 1996); Farnworth v. Ratliff, 134 Idaho 237, 999 P.2d 892 (2000); Butler v. Elle, 281 F.3d 1014 (9th Cir. 2002); Van v. Portneuf Med. Ctr., 147 Idaho 552, 212 P.3d 982 (2009).

RESEARCH REFERENCES

Am. Jur. — 56 Am. Jur. 2d, Municipal Corporations, Counties and Other Political Subdivisions, §§ 629 to 746.

C.J.S. — 63 C.J.S., Municipal Corporations, §§ 817 to 844.

6-906A. Time for filing claims by minors. — No person who is a minor shall be required to present and file a claim against a governmental entity or its employee under this chapter until one hundred eighty (180) days after said person reaches the age of majority or six (6) years from the date the claim arose or should reasonably have been discovered, whichever is earlier.

History.
I.C., § 6-906A as added by 1985, ch. 77, § 1, p. 151; am. 1994, ch. 349, § 1, p. 1109.

JUDICIAL DECISIONS

ANALYSIS

Applicability.
Failure to file timely notice.
Purpose.

Applicability.
This section, not § 6-1701, the statute of limitations for filing tort actions in child abuse cases, applied to a sexual abuse claim brought by a minor against a school district and teacher. Osborn v. Salinas, 131 Idaho 456, 958 P.2d 1142 (1998).

Failure to File Timely Notice.
Failure to file a notice of tort claim was fatal to a suit against the University of Idaho which arose from injuries sustained by a minor who fell from a catwalk in a university gymnasium; the suit was filed eight years after the accident and 18 months after the minor became an adult. Banks v. University of Idaho, 118 Idaho 607, 798 P.2d 452 (1990).

Purpose.
This section makes clear both the legislature's intent to protect minor claimants from the running of the notice time period, and its intent to apply the precise policy of § 5-230, including the six-year maximum, to notice requirements. Doe v. Durtschi, 110 Idaho 466, 716 P.2d 1238 (1986).

Cited in: Walker v. Shoshone County, 112 Idaho 991, 739 P.2d 290 (1987).

6-907. Contents of claims — Filing by agent or attorney — Effect of inaccuracies. — All claims presented to and filed with a governmental entity shall accurately describe the conduct and circumstances which brought about the injury or damage, describe the injury or damage, state the time and place the injury or damage occurred, state the names of all persons involved, if known, and shall contain the amount of damages claimed, together with a statement of the actual residence of the claimant at the time of presenting and filing the claim and for a period of six (6) months immediately prior to the time the claim arose. If the claimant is incapacitated from presenting and filing his claim within the time prescribed or if the claimant is a minor or if the claimant is a nonresident of the state and is absent during the time within which his claim is required to be filed, the claim may be presented and filed on behalf of the claimant by any relative, attorney or agent representing the claimant. A claim filed under the provisions of this section shall not be held invalid or insufficient by reason of an inaccuracy in stating the time, place, nature or cause of the claim, or otherwise, unless it is shown that the governmental entity was in fact misled to its injury thereby.

History.
1971, ch. 150, § 7, p. 743.

JUDICIAL DECISIONS

ANALYSIS

Adequacy of Complaint.

Although the contents of a letter did not comply with all the requirements enumerated in this section, the contents of the letter were adequate where there was nothing in the record to suggest that the city was "misled to its injury" by any deficiencies in the contents of the letter. Smith v. City of Preston, 99 Idaho 618, 586 P.2d 1062 (1978).

The plaintiff's demand letter failed to serve as notice of a claim pursuant to the Tort Claims Act, since it failed to state the names and addresses of the claimants, the amounts of claimed damages and the nature of the injury claimed. Wickstrom v. North Idaho College, 111 Idaho 450, 725 P.2d 155 (1986).

Compliance.

The oral statements made by the plaintiff's attorney to the defendant hospital's administrator did not constitute the filing of a claim under the ITCA, because a written demand is plainly required by this section. Mitchell v. Bingham Mem. Hosp., 130 Idaho 420, 942 P.2d 544 (1997).

Filing by Person Other than Claimant.

The fact that this section specifically permits someone to file a claim on behalf of the claimant, if the claimant is a minor, incapacitated or a nonresident and absent from the state, does not mean that the claim in all other cases must be filed personally by the claimant. Smith v. City of Preston, 99 Idaho 618, 586 P.2d 1062 (1978).

In General.

Statement to city housing authority by claimant's son-in-law that he believed authority was responsible for claimant's injuries caused when she fell on ice in authority's parking lot neither contained the information required for valid and sufficient notice under this section, nor constituted a claim filed under the provisions of this section. Friel v. Boise City Hous. Auth., 126 Idaho 484, 887 P.2d 29 (1994).

Jury Issue.

Question as to whether a claimant's incapacity excused her from the time requirements of § 6-906 is one for the jury, which must determine first, if the incapacity is sufficient to excuse compliance, and second, how long the claimant's physical and mental incapacity served to toll the beginning of the statutory period for filing notice. Larson v. Emmett Joint Sch. Dist. No. 221, 99 Idaho 120, 577 P.2d 1168 (1978).

Notice.

Since an insurer's subrogation claim is derived from and dependent upon successful prosecution of the insured's claim, notice by a motorist's insurance carrier of a subrogation claim was, therefore, necessarily also notice of the motorist's claim upon which the subrogation request was founded. Smith v. City of Preston, 99 Idaho 618, 586 P.2d 1062 (1978).

The primary function of notice under the Tort Claims Act is to put the governmental entity on notice that a claim against it is being prosecuted, and notice serving that function would not be insufficient unless the governmental entity was misled to its injury. Huff v. Uhl, 103 Idaho 274, 647 P.2d 730 (1982).

Where written estimate given irrigation district by plaintiff did not contain a statement of demand, but the district was clearly apprised of the fact that a claim was being prosecuted against it and of the amount thereof, as confirmed by the activities of both district employee and district's insurance carrier subsequent to plaintiff's delivery of notice, and where there was no evidence that district was misled to its injury by any deficiency in notice, notice of claim was sufficient under the Tort Claims Act. Huff v. Uhl, 103 Idaho 274, 647 P.2d 730 (1982).

A letter to the city from the insurance company of defendants in wrongful death action notifying the city of the claim against the defendants and stating that the city appeared to be responsible, did not constitute notice of a claim by the plaintiffs against the city. Stevens v. Fleming, 116 Idaho 523, 777 P.2d 1196 (1989).

A notice of a potential claim, which does not strictly comply with all of the requirements of this section, may nonetheless satisfy the ITCA notice requirements. Friel v. Boise City Hous. Auth., 126 Idaho 484, 887 P.2d 29 (1994).

Claimant's oral notice to city housing authority of a potential insurance claim was not

adequate notice under this section and § 6-906 of a tort claim. Friel v. Boise City Hous. Auth., 126 Idaho 484, 887 P.2d 29 (1994).

An insurance company's awareness of an accident or medical expenses does not relieve a claimant of the burden to file a timely notice of tort claim under §§ 6-908 and 6-905 with the appropriate governmental entity in accordance with the provisions of this section. Avila v. Wahlquist, 126 Idaho 745, 890 P.2d 331 (1995).

Letters and billing statements sent by lessors to a city/lessee were sufficient "claims" to preclude summary judgment on the basis of the notice requirements of Idaho Code § 50-219 and the Idaho Tort Claims Act. Counsel's letter demanded payment pursuant to the lease, described the conduct and circumstances which brought about the claimed injury in monetary terms, included relevant dates, and specifically demanded payment of a specific amount with interest due; annual billing statements also identified the lease by number, the parties to the lease, and tracked by date the imposition of rent, the accrual of interest, and payments. Cox v. City of Sandpoint, 140 Idaho 127, 90 P.3d 352 (Ct. App. 2003).

In malpractice suit, trial court properly denied patient's motion to reconsider grant of summary judgment in favor of hospital. Newly-discovered evidence that showed hospital had received copy of patient's letter informing the Idaho state board of medicine (ISBM) of his malpractice claim did not constitute adequate notice and would not have changed the trial court's summary judgment ruling. The patient could not rely on the ISBM's forwarding of his letter to the hospital to establish notice where he had no special relationship with the ISBM. Foster v. Kootenai Med. Ctr., 143 Idaho 425, 146 P.3d 691 (Ct. App. 2006).

Purpose.

The purpose of the Tort Claims Act is to (1) save needless expense and litigation by providing an opportunity for amicable resolution of the differences between parties, (2) allow authorities to conduct a full investigation into the cause of the injury in order to determine the extent of the state's liability, if any, and (3) allow the state to prepare defenses. Friel v. Boise City Hous. Auth., 126 Idaho 484, 887 P.2d 29 (1994).

Cited in: Independent Sch. Dist. v. Callister, 97 Idaho 59, 539 P.2d 987 (1975); Simpson v. Mountain Home Sch. Dist. No. 193, 99 Idaho 845, 590 P.2d 101 (1979); Doe v. Durtschi, 110 Idaho 466, 716 P.2d 1238 (1986); Thompson v. City of Idaho Falls, 126 Idaho 587, 887 P.2d 1094 (Ct. App. 1994).

RESEARCH REFERENCES

Am. Jur. — 56 Am. Jur. 2d, Municipal Corporations, Counties and Other Public Subdivisions, §§ 678 to 716.

C.J.S. — 63 C.J.S., Municipal Corporations, §§ 820 to 834, 843.

A.L.R. — Modern status of the law as to validity of statutes or ordinances requiring notice of tort claim against local governmental immunity. 59 A.L.R.3d 93.

6-908. Restriction on allowance of claims. — No claim or action shall be allowed against a governmental entity or its employee unless the claim has been presented and filed within the time limits prescribed by this act.

History.

1971, ch. 150, § 8, p. 743; am. 1976, ch. 309, § 7, p. 1062.

STATUTORY NOTES

Compiler's Notes.

The words "this act" refer to S.L. 1971, ch. 150, which is compiled as §§ 6-901, 6-902, 6-904, 6-905, 6-906, 6-907 to 6-918, 6-919 to 6-925, 6-927, and 6-928. Probably, the reference should be to "this chapter," being chapter 9, title 6, Idaho Code.

JUDICIAL DECISIONS

Analysis

Action against school district.
Actual notice.

Compliance.
Equitable tolling.
No exemptions.
Notice requirements.
Notice to liability carrier.
Nuisance claim.

Action Against School District.

The notice of claims required by the tort claims act applies to actions brought against an independent school district which operates by virtue of a charter from the legislature. Independent Sch. Dist. v. Callister, 97 Idaho 59, 539 P.2d 987 (1975), disapproved on other grounds, Larson v. Emmett Joint Sch. Dist. No. 221, 99 Idaho 120, 577 P.2d 1168 (1978).

Actual Notice.

Where the state had investigated an accident but had no reason to suspect it might be subject to tort claims arising from the accident, the state did not have sufficient notice of subsequent tort claims against it which would have rendered literal compliance with notice provisions unnecessary and, thus, plaintiffs were required to give timely notice in order to maintain suit on their claims. Newlan v. State, 96 Idaho 711, 535 P.2d 1348, appeal dismissed, 423 U.S. 993, 96 S. Ct. 419, 46 L. Ed. 2d 367 (1975).

A city's actual notice of plaintiff's damages which resulted from the city's alleged failure to properly operate its municipal water system did not take plaintiff's complaint out of the notice of claim requirements. Calkins v. Fruitland, 97 Idaho 263, 543 P.2d 166 (1975).

Appellant's contention that the tort claim notices sent to two neighboring counties should have served to put the county at issue on notice that a claim against it was being prosecuted, since the attorney for Idaho county reciprocal management program (ICRMP), which was the liability insurer for all three counties involved, was agent of the county at issue was held by the supreme court to be without merit as the county at issue cannot be charged with notice of a claim against it merely because the attorney for the ICRMP became aware of claims asserted against neighboring counties. Kramer v. Central Hwy. Dist., 126 Idaho 722, 889 P.2d 1112 (1995).

An insurance company's awareness of an accident or medical expenses does not relieve a claimant of the burden to file a timely notice of tort claim under this section and § 6-905 with the appropriate governmental entity in accordance with the provisions of § 6-907. Avila v. Wahlquist, 126 Idaho 745, 890 P.2d 331 (1995).

Compliance.

Compliance with notice of claim requirement is mandatory and without such compliance a suit against the state may not be maintained. Newlan v. State, 96 Idaho 711, 535 P.2d 1348, appeal dismissed, 423 U.S. 993, 96 S. Ct. 419, 46 L. Ed. 2d 367 (1975).

Where plaintiffs failed to present claim against the state to secretary of state within 120 [now 180 days] days after their alleged cause of action arose, the district court properly dismissed the action under authority of this section. Jacaway v. State, 97 Idaho 694, 551 P.2d 1330 (1976).

Question as to whether a claimant's incapacity excused her from the time requirements of § 6-906 is one for the jury, which must determine first, if the incapacity is sufficient to excuse compliance, and second, how long the claimant's physical and mental incapacity served to toll the beginning of the statutory period for fiiling notice. Larson v. Emmett Joint Sch. Dist. No. 221, 99 Idaho 120, 577 P.2d 1168 (1978).

Where, in an action to recover damages resulting from a condemnation proceeding, the claims against the defendants were based on their official actions as employees of the city, and the plaintiffs did not file a tort claim with the city, the plaintiffs were barred from pursuing a cause of action against the defendants. Anderton v. Herrington, 113 Idaho 73, 741 P.2d 360 (Ct. App. 1987).

It is well settled that compliance with the Tort Claims Act's notice requirement is a mandatory condition precedent to bringing suit, the failure of which is fatal to a claim, no matter how legitimate. Udell v. Idaho State Bd. of Land Comm'rs ex rel. Idaho Att'y Gen., 119 Idaho 1018, 812 P.2d 325 (Ct. App. 1991).

Equitable Tolling.

Even if it were assumed that potential claimant should not have reasonably discovered the basis for his claim prior to July 2006 and that the Idaho Tort Claims Act, § 6-901 et seq., allowed for the tolling of the statute of limitations on the basis of claimant's imprisonment and lack of access to legal materials, applying equitable tolling in this circumstance would not have rendered plaintiff's claim timely. Although plaintiff had access to his legal documents and sufficient Idaho law to begin work on his complaint in September 2007, plaintiff did not file the requisite 180-day notice of a tort claim with the secretary of state until approximately eight months later, in May 2008. Driggers v. Grafe, — Idaho —, 221 P.3d 521 (Ct. App. 2009).

No Exemptions.

The fact that parents, whose son died as a result of an automobile accident allegedly caused by the state's use of inappropriate paving materials, were not aware that they had a cause of action against the state until they consulted with their lawyer did not render unnecessary their compliance with the requirement that the tort claim be filed within 120 days [now 180 days] from the date the claim arose, since the parents had knowledge of the facts the day of the accident. Newlan v. State, 96 Idaho 711, 535 P.2d 1348, appeal dismissed, 423 U.S. 993, 96 S. Ct. 419, 46 L. Ed. 2d 367 (1975).

In actions against governmental entities, plaintiffs are not exempt from the notice of claim requirements because of minority, substantial actual notice having been given, or because of the relative size of the governmental units. Independent Sch. Dist. v. Callister, 97 Idaho 59, 539 P.2d 987 (1975), disapproved on other grounds, Larson v. Emmett Joint Sch. Dist. No. 221, 99 Idaho 120, 577 P.2d 1168 (1978).

Though minors and those suffering incapacities were not intended to be exempted from notice of claim requirements, minority and incapacitation are factors which may be considered in deciding whether a claim reasonably should have been discovered. Independent Sch. Dist. v. Callister, 97 Idaho 59, 539 P.2d 987 (1975), disapproved on other grounds, Larson v. Emmett Joint Sch. Dist. No. 221, 99 Idaho 120, 577 P.2d 1168 (1978) (see § 6-906A).

Notice Requirements.

Compliance with the notice of claim requirement is a mandatory condition precedent to bringing suit against the state or its employee. Overman v. Klein, 103 Idaho 795, 654 P.2d 888 (1982).

Where the complaint affirmatively alleged that defendant state employees were acting within the scope and course of their employment, since this section requires the filing of a notice of claim, as a prerequisite to a suit against a governmental employee acting within the course and scope of his employment, and since no such claim was filed, the trial court properly dismissed the cause of action against defendants in their individual capacities on the basis of plaintiff's failure to file a notice of claim. Overman v. Klein, 103 Idaho 795, 654 P.2d 888 (1982).

A complaint asserting tort claims against employees of the state department of health and welfare in their official capacities was, in essence, a suit against the state and was properly dismissed for failure to comply with the notice requirements mandated by § 6-905 and this section. Overman v. Klein, 103 Idaho 795, 654 P.2d 888 (1982).

Compliance with the Idaho Tort Claims Act's notice requirement is a mandatory condition precedent to bringing suit, the failure of which is fatal to a claim, no matter how legitimate. McQuillen v. City of Ammon, 113 Idaho 719, 747 P.2d 741 (1987).

The language of this section — that no claim or action shall be "allowed" — has consistently been interpreted to mean that compliance with the notice requirement of the Tort Claims Act is a mandatory condition precedent to bringing an action under the act. Madsen v. Idaho Dep't of Health & Welfare, 116 Idaho 758, 779 P.2d 433 (Ct. App. 1989).

Failure to file a notice of tort claim was fatal to a suit against the University of Idaho which arose from injuries sustained by a minor who fell from a catwalk in a university gymnasium; the suit was filed eight years after the accident and 18 months after the minor became an adult. Banks v. University of Idaho, 118 Idaho 607, 798 P.2d 452 (1990).

The language of § 6-905 is mandatory and, when it is read together with this section, it is clear that failure to comply with the notice requirement bars a suit. Greenwade v. Idaho State Tax Comm'n, 119 Idaho 501, 808 P.2d 420 (Ct. App. 1991).

Where appellant, injured due to lack of a warning sign when he crossed the border from one county into another and the paved road turned to gravel, failed to file a notice of tort claim against the proper county within the 180 day time frame specified by § 6-906 and this section, his claim was prohibited. Kramer v. Central Hwy. Dist., 126 Idaho 722, 889 P.2d 1112 (1995).

Notice to Liability Carrier.

In plaintiff's suit against an independent school district for damages resulting from personal injuries suffered during school hours, where no insurance company was a party to the action, plaintiff's argument that the statutory notice of claim is not required when recovery is sought from the liability carrier of the governmental entity was without merit. Independent Sch. Dist. v. Callister, 97 Idaho 59, 539 P.2d 987 (1975), disapproved on other grounds, Larson v. Emmett Joint Sch. Dist. No. 221, 99 Idaho 120, 577 P.2d 1168 (1978).

Nuisance Claim.

Trial court improperly granted a city's motion to dismiss a suit brought by property owners alleging tort claims arising out of problems associated with an adjacent, unpaved road; the speeding cars and the dust caused by the road were continuous so the limitations period provided in the Idaho Tort Claims Act (ITCA) was not applicable, and the property owners should have been allowed to amend their complaint to include a claim for nuisance, which was not governed by the

ITCA. Cobbley v. City of Challis, 138 Idaho 154, 59 P.3d 959 (2002).

Cited in: Trosper v. Raymond, 99 Idaho 54, 577 P.2d 33 (1978); Madsen v. Idaho Dep't of Health & Welfare, 114 Idaho 624, 759 P.2d 915 (Ct. App. 1988); Pounds v. Denison, 120 Idaho 425, 816 P.2d 982 (1991); Frost v. Robertson, 2009 U.S. Dist. LEXIS 24006 (D. Idaho 2009).

RESEARCH REFERENCES

C.J.S. — 63 C.J.S., Municipal Corporations, §§ 817 to 827.
81A C.J.S., States, § 467 et seq.
A.L.R. — Attorney's mistake on neglect as excuse for failing to file timely notice of tort claim against state or local governmental unit. 55 A.L.R.3d 930.

6-909. Time for allowance or denial of claims — Effect of failure to act. — Within ninety (90) days after the filing of the claim against the governmental entity or its employee, the governmental entity shall act thereon and notify the claimant in writing of its approval or denial. A claim shall be deemed to have been denied if at the end of the ninety (90) day period the governmental entity has failed to approve or deny the claim.

History.
1971, ch. 150, § 9, p. 743; am. 1976, ch. 309, § 8, p. 1062; am. 1978, ch. 272, § 4, p. 630.

JUDICIAL DECISIONS

Cited in: Curtis v. City of Ketchum, 111 Idaho 27, 720 P.2d 210 (1986); Walker v. Shoshone County, 112 Idaho 991, 739 P.2d 290 (1987); Higginson v. Wadsworth, 128 Idaho 439, 915 P.2d 1 (1996).

RESEARCH REFERENCES

Am. Jur. — 56 Am. Jur. 2d, Municipal Corporations, Counties and Other Political Subdivisions, §§ 747, 758.

6-910. Suit on denied claims permitted. — If the claim is denied, a claimant may institute an action in the district court against the governmental entity or its employee in those circumstances where an action is permitted by this act.

History.
1971, ch. 150, § 10, p. 743; am. 1976, ch. 309, § 9, p. 1062.

STATUTORY NOTES

Compiler's Notes.
The words "this act" refer to S.L. 1971, ch. 150, which is compiled as §§ 6-901, 6-902, 6-904, 6-905, 6-906, 6-907 to 6-918, 6-919 to 6-925, 6-927, and 6-928. Probably, the reference should be to "this chapter," being chapter 9, title 6, Idaho Code.

JUDICIAL DECISIONS

Cited in: Curtis v. City of Ketchum, 111 Idaho 27, 720 P.2d 210 (1986).

6-911. Limitation of actions. — Every claim against a governmental entity permitted under the provisions of this act or against an employee of a governmental entity shall be forever barred, unless an action is begun within two (2) years after the date the claim arose or reasonably should have been discovered, whichever is later.

History.
1971, ch. 150, § 11, p. 743; am. 1976, ch. 309, § 10, p. 1062; am. 1985, ch. 136, § 3, p. 372.

STATUTORY NOTES

Compiler's Notes.
The words "this act" refer to S.L. 1971, ch. 150, which is compiled as §§ 6-901, 6-902, 6-904, 6-905, 6-906, 6-907 to 6-918, 6-919 to 6-925, 6-927, and 6-928. Probably, the reference should be to "this chapter," being chapter 9, title 6, Idaho Code.

JUDICIAL DECISIONS

ANALYSIS

Application.
Discovery of claim.
In general.
Notice requirement.
Time claim filed.
Wrongful death action.

Application.
This is the applicable statute of limitation under the Idaho Tort Claims Act. No other statute of limitation applies. Carman v. Carman, 114 Idaho 551, 758 P.2d 710 (Ct. App. 1988).

Claim arose when plaintiff was injured in car accident on highway, and not earlier when department of transportation had worked on highway, because before the accident plaintiff had not sustained any damage as a result of the condition of highway and was not in a position to sue. Esterbrook v. State, 124 Idaho 680, 863 P.2d 349 (1993).

Discovery of Claim.
Where a question of material fact existed concerning whether plaintiff reasonably should have discovered her claim against the county prior to 1984, the limitation period should not have been applied but the issue should have been determined by the jury. Carman v. Carman, 114 Idaho 551, 758 P.2d 710 (Ct. App. 1988).

In General.
Since the tort claims act has an express statute of limitations which begins to run commencing with the filing of the notice of claim, the notice of claim requirement is not a statute of limitations. Independent Sch. Dist. v. Callister, 97 Idaho 59, 539 P.2d 987 (1975), disapproved on other grounds, Larson v. Emmett Joint Sch. Dist. No. 221, 99 Idaho 120, 577 P.2d 1168 (1978).

Notice Requirement.
The 120-day (now 180-day) notice provision of § 6-906 is not itself a statute of limitations; this section provides for the limitation of actions thereunder. The notice requirement is in addition to the applicable statute of limitations. McQuillen v. City of Ammon, 113 Idaho 719, 747 P.2d 741 (1987).

Time Claim Filed.
Where notice of claim was filed against the defendant on September 10, 1984, and the action was filed on September 5, 1986, less than two years after notice of claim was filed, the claim was not barred because, at the time the cause of action arose, this section provided that claim against a governmental entity was barred unless an action was brought within two years after a claim was filed with the governmental entity. Union Pac. R.R. v. Idaho, 654 F. Supp. 1236 (D. Idaho 1987) (decision prior to 1985 amendment); Union

Pac. R.R. v. Idaho, 663 F. Supp. 75 (D. Idaho 1987).

District court improperly dismissed, as untimely, prisoner's pro se civil complaint, because document that he submitted within the limitations period sufficed as a complaint, in that it: (1) alleged the essential facts to state a claim that he was entitled to relief; (2) explicitly stated that he had already complied with the notice requirements; and (3) while captioned as a "tort claim," characterized the attached filing as a "complaint/claim," in part employing language commonly used to signal the intended commencement of a civil complaint. Hauschulz v. State, 143 Idaho 462, 147 P.3d 94 (Ct. App. 2006).

Wrongful Death Action.

Where the wrongful death action against the county was grounded in tort, the more specific statute of limitations, the two-year bar of this section, controlled rather than the six-month bar of § 5-221. Walker v. Shoshone County, 112 Idaho 991, 739 P.2d 290 (1987).

Cited in: Farber v. State, 102 Idaho 398, 630 P.2d 685 (1981); Henderson v. State, 110 Idaho 308, 715 P.2d 978 (1986); Herrera v. Conner, 111 Idaho 1012, 729 P.2d 1075 (Ct. App. 1986).

RESEARCH REFERENCES

C.J.S. — 63 C.J.S., Municipal Corporations, §§ 845, 846.

81A C.J.S., States, § 467 et seq.

6-912. Compromise and settlement by governing body. — The governing body of each political subdivision, after conferring with its legal officer or counsel, may compromise and settle any claim allowed by this act, subject to the terms of the insurance, if any.

History.

1971, ch. 150, § 12, p. 743.

STATUTORY NOTES

Compiler's Notes.

The words "this act" refer to S.L. 1971, ch. 150, which is compiled as §§ 6-901, 6-902, 6-904, 6-905, 6-906, 6-907 to 6-918, 6-919 to 6-925, 6-927, and 6-928. Probably, the reference should be to "this chapter," being chapter 9, title 6, Idaho Code.

RESEARCH REFERENCES

Am. Jur. — 56 Am. Jur. 2d, Municipal Corporations, Counties and Other Political Subdivisions, §§ 749 to 769.

C.J.S. — 64A C.J.S., Municipal Corporations, § 1930.

6-913. Compromise and settlement by board of examiners. — The board of examiners may compromise and settle any claim allowed by this act, subject to the terms of the insurance, if any.

History.

1971, ch. 150, § 13, p. 743.

STATUTORY NOTES

Compiler's Notes.

The words "this act" refer to S.L. 1971, ch. 150, which is compiled as §§ 6-901, 6-902, 6-904, 6-905, 6-906, 6-907 to 6-918, 6-919 to 6-925, 6-927, and 6-928. Probably, the reference should be to "this chapter," being chapter 9, title 6, Idaho Code.

6-914. Jurisdiction — Rules of procedure. — The district court shall have jurisdiction over any action brought under this act and such actions shall be governed by the Idaho rules of civil procedure insofar as they are consistent with this act.

History.
1971, ch. 150, § 14, p. 743.

STATUTORY NOTES

Compiler's Notes.
The words "this act" refer to S.L. 1971, ch. 150, which is compiled as §§ 6-901, 6-902, 6-904, 6-905, 6-906, 6-907 to 6-918, 6-919 to 6-925, 6-927, and 6-928. Probably, the reference should be to "this chapter," being chapter 9, title 6, Idaho Code.

RESEARCH REFERENCES

Am. Jur. — 56 Am. Jur. 2d, Municipal Corporations, Counties and Other Political Subdivisions, § 791.
57 Am. Jur. 2d, Municipal, School, and State Tort Liability, § 270.
C.J.S. — 63 C.J.S., Municipal Corporations, § 814.
81A C.J.S., States, § 564 et seq.

6-915. Venue. — Actions against the state or its employee shall be brought in the county in which the cause of action arose or in Ada County. In addition, a resident of the state of Idaho may bring an action in the county of his residence.

Actions against a political subdivision or its employee shall be brought in the county in which the cause of action arose or in any county where the political subdivision is located.

History.
1971, ch. 150, § 15, p. 743; am. 1976, ch. 309, § 11, p. 1062.

RESEARCH REFERENCES

Am. Jur. — 56 Am. Jur. 2d, Municipal Corporations, Counties and Other Political Subdivisions, §§ 793 to 796.
57 Am. Jur. 2d, Municipal, County, School, and State Tort Liability, §§ 607, 608.
C.J.S. — 63 C.J.S., Municipal Corporations, § 814.
81A C.J.S., States, § 564 et seq.

6-916. Service of summons. — In all actions under this act against the state or its employee the summons and complaint shall be served on the secretary of state with a copy to the attorney general. This section shall not be construed to release the party making service of process from serving any named defendant other than the governmental entity in compliance with other applicable statutes or rules of civil proceeding.

In all actions under this act against any employee wherein it is alleged that such employee was acting within the course and scope of his employment, a copy of the summons and complaint shall be served upon the governmental entity which is his employer.

History.
1971, ch. 150, § 16, p. 743; am. 1976, ch. 309, § 12, p. 1062; am. 1978, ch. 272, § 5, p. 630.

STATUTORY NOTES

Compiler's Notes.
The words "this act", in the first paragraph, refer to S.L. 1971, ch. 150, which is compiled as §§ 6-901, 6-902, 6-904, 6-905, 6-906, 6-907 to 6-918, 6-919 to 6-925, 6-927, and 6-928. Probably, the reference should be to "this chapter," being chapter 9, title 6, Idaho Code.

The words "this act", in the second paragraph, refer to S.L. 1978, ch. 272, which is compiled as §§ 6-903, 6-904, 6-909, 6-916, and 6-918A. Probably, the reference should be to "this chapter," being chapter 9, title 6, Idaho Code.

JUDICIAL DECISIONS

Action Dismissed.
District court properly dismissed a negligence complaint against the board of professional discipline of the Idaho state board of medicine, because the claimants failed to serve the summons and complaint upon the Idaho secretary of state as well as the Idaho attorney general within six months after filing the complaint and did not show good cause for their failure to do so. Harrison v. Bd. of Prof'l Discipline of the Idaho State Bd. of Med., 145 Idaho 179, 177 P.3d 393 (2008).

RESEARCH REFERENCES

Am. Jur. — 56 Am. Jur. 2d, Municipal Corporations, Counties and Other Political Subdivisions, § 792.

C.J.S. — 63 C.J.S., Municipal Corporations, §§ 847 to 850.
81A C.J.S., States, § 564 et seq.

6-917. Recovery against governmental entity bar to action against employee. — Recovery against a governmental entity under the provisions of this act shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee whose negligence or wrongful act or omission gave rise to the claim.

History.
1971, ch. 150, § 17, p. 743.

STATUTORY NOTES

Compiler's Notes.
The words "this act" refer to S.L. 1971, ch. 150, which is compiled as §§ 6-901, 6-902, 6-904, 6-905, 6-906, 6-907 to 6-918, 6-919 to 6-925, 6-927, and 6-928. Probably, the reference should be to "this chapter," being chapter 9, title 6, Idaho Code.

6-918. No punitive damages. — Governmental entities and their employees shall not be liable for punitive damages on any claim allowed under the provisions of this act.

History.
1971, ch. 150, § 18, p. 743; am. 1976, ch. 309, § 13, p. 1062.

STATUTORY NOTES

Compiler's Notes.
The words "this act" refer to S.L. 1971, ch. 150, which is compiled as §§ 6-901, 6-902, 6-904, 6-905, 6-906, 6-907 to 6-918, 6-919 to 6-925, 6-927, and 6-928. Probably, the reference should be to "this chapter," being chapter 9, title 6, Idaho Code.

JUDICIAL DECISIONS

Application.

Plaintiff's claim for punitive damages in suit against state tax commission and sheriff for trespassing upon his property and unlawfully seizing his property could not be maintained because it is proscribed by this section. Greenwade v. Idaho State Tax Comm'n, 119 Idaho 501, 808 P.2d 420 (Ct. App. 1991).

In the absence of language in the Idaho human rights act (IHRA) limiting liability against the state, the more specific imposition of liability under IHRA controls over the more general immunity contained in this section; therefore, court found that, in an action under IHRA, this section did not preclude the entry of a punitive damages award against the state. Paterson v. State, 128 Idaho 494, 915 P.2d 724 (1996).

Cited in: Olguin v. City of Burley, 119 Idaho 721, 810 P.2d 255 (1991).

RESEARCH REFERENCES

A.L.R. — Recovery of exemplary or punitive damages from municipal corporation. 1 A.L.R.4th 448.

6-918A. Attorneys' fees. — At the time and in the manner provided for fixing costs in civil actions, and at the discretion of the trial court, appropriate and reasonable attorney fees may be awarded to the claimant, the governmental entity or the employee of such governmental entity, as costs, in actions under this act, upon petition therefor and a showing, by clear and convincing evidence, that the party against whom or which such award is sought was guilty of bad faith in the commencement, conduct, maintenance or defense of the action. In no case shall such attorney fee award or any combination or total of such awards, together with other costs and money judgment or judgments for damages exceed, in the aggregate, the limitations on liability fixed by section 6-926, Idaho Code. The right to recover attorney fees in legal actions for money damages that come within the purview of this act shall be governed exclusively by the provisions of this act and not by any other statute or rule of court, except as may be hereafter expressly and specifically provided or authorized by duly enacted statute of the state of Idaho.

History.

I.C., § 6-918A, as added by 1978, ch. 272, § 6, p. 630.

STATUTORY NOTES

Compiler's Notes.

The words "this act" refer to S.L. 1978, ch. 272, which is compiled as §§ 6-903, 6-904, 6-909, 6-916, and 6-918A. Probably, the reference should be to "this chapter," being chapter 9, title 6, Idaho Code.

JUDICIAL DECISIONS

ANALYSIS

Application.
Fees not awarded.
Not to displace rule 11(a)(1).

Application.

Section 12-121, which broadly authorizes a discretionary award of attorney fees "in any civil case," could not be applied to case brought under the Tort Claims Act since such case was governed by this section, which specifically relates to tort claims. Packard v. Joint Sch. Dist. No. 171, 104 Idaho 604, 661 P.2d 770 (Ct. App. 1983).

To the extent of any conflict between § 12-121 and this section, the court applies this section. It is not only the later statute, but also a more specific statement of the legislature's intent about the award of attorney fees in tort claims cases. Tomich v. City of Pocatello, 127 Idaho 394, 901 P.2d 501 (1995).

Fees Not Awarded.

Attorney fees would not be awarded on appeal of tort claim case where appeal was free of bad faith and judgment from which both sides appealed was upheld in its entirety. Packard v. Joint Sch. Dist. No. 171, 104 Idaho 604, 661 P.2d 770 (Ct. App. 1983).

Contention that this section, when viewed in contrast to § 12-121, discriminates impermissibly against those tort plaintiffs whose claims lie against a governmental entity rather than against private parties would not be addressed by court where attorney fees in particular case could not have been awarded under either statute because of failure to show that case was defended frivolously or without foundation. Packard v. Joint Sch. Dist. No. 171, 104 Idaho 604, 661 P.2d 770 (Ct. App. 1983).

Although the appeal was taken on dubious grounds, it did not warrant a fee award under this section. Bissett v. Unnamed Members of Political Compact, 111 Idaho 863, 727 P.2d 1291 (Ct. App. 1986).

Because there was no indication that an appeal was pursued frivolously, in bad faith, or without foundation, there was no basis for an award of fees. Jensen v. State, 139 Idaho 57, 72 P.3d 897 (2003).

Where the owners of a cabin sued the county and a county inspector after the owners were issued a building permit from the county indicating that the county building inspector had completed a plan review check sheet, only to find out later that the cabin structure did not meet the snow load requirements, the county and the county inspector were not entitled to recover attorney fees on appeal since there was no evidence that the owners pursued the appeal in bad faith. Nelson v. Anderson Lumber Co., 140 Idaho 702, 99 P.3d 1092 (Ct. App. 2004).

Because there was no indication that the guardians were guilty of bad faith in the commencement, conduct, or maintenance of their action against the county, and indeed, prevailed twice on appeal, there was no basis for an award of attorney fees to the county. O'Guin v. Bingham County, 142 Idaho 49, 122 P.3d 308 (2005).

In corrections officers' suit based on the disclosure of personal information, where defendants were granted summary judgment, attorney fees were denied on appeal to the officers and defendants because there was no evidence that either party commenced, conducted, maintained, or defended the action in bad faith. Nation v. State, 144 Idaho 177, 158 P.3d 953 (2007).

School district's request for attorney fees was denied where it could not be said that the teacher pursued the appeal against the district in bad faith. Cordova v. Bonneville County Joint Sch. Dist. No. 93, 144 Idaho 637, 167 P.3d 774 (2007).

Not to Displace Rule 11(a)(1).

Idaho Civil Procedure Rule 11(a)(1) is not a broad compensatory law. It is a court management tool, and the power to impose sanctions under that rule is exercised narrowly, focusing on discrete pleading abuses or other types of litigative misconduct within the overall course of lawsuit; it is not the type of "rule of court" the legislature intended to displace with this section. Kent v. Pence, 116 Idaho 22, 773 P.2d 290 (Ct. App. 1989).

Idaho Code § 12-121 contains no express and specific language providing an exception to the exclusive scope of this section. Therefore, § 12-121 yields to this section in tort claim cases. Kent v. Pence, 116 Idaho 22, 773 P.2d 290 (Ct. App. 1989).

Cited in: Kolar v. Cassia County Idaho, 142 Idaho 346, 127 P.3d 962 (2005); Cobbley v. City of Challis, 143 Idaho 130, 139 P.3d 732 (2006); Dorea Enters. v. City of Blackfoot, 144 Idaho 422, 163 P.3d 211 (2007).

RESEARCH REFERENCES

Am. Jur. — 57 Am. Jur. 2d, Municipal, County, School, and State Tort Liability, §§ 654, 655.

C.J.S. — 63 C.J.S., Municipal Corporations, § 872.

81A C.J.S., States, § 564 et seq.

6-919. Liability insurance for state — Comprehensive plan by division of insurance management [office of insurance manage-

ment]. — The administrator of the division of insurance management [office of insurance management] in the department of administration shall provide a comprehensive liability plan which will cover and protect the state and its employees from claims and civil lawsuits. He shall be responsible for the acquisition and administration of all liability insurance of the state or for the use of the retained risk account provided in section 67-5776, Idaho Code, to meet the obligations of the comprehensive liability plan.

The administrator shall, after consultation with the departments, agencies, commissions, and other instrumentalities of the state, provide a comprehensive liability plan for the state providing liability coverage to the state and its employees in amounts not less than the minimum specified in section 6-924, Idaho Code. He shall have the authority to use the retained risk account provided in section 67-5776, Idaho Code, or to purchase, renew, cancel and modify all policies according to the comprehensive liability plan.

History.
1971, ch. 150, § 19, p. 743; am. 1974, ch. 34, § 9, p. 988; am. 1974, ch. 252, § 7, p. 1674; am. 1976, ch. 310, § 1, p. 1069; am. 1980, ch. 106, § 1, p. 231.

STATUTORY NOTES

Compiler's Notes.
The bracketed insertions in the section heading and in the first sentence were added by the compiler to correct the referenced agency's name.

JUDICIAL DECISIONS

Cited in: Union Pac. R.R. v. Idaho, 654 F. Supp. 1236 (D. Idaho 1987).

RESEARCH REFERENCES

A.L.R. — Validity and construction of statute authorizing or requiring governmental unit to procure liability insurance covering public officers or employees for liability arising out of performance of public duties. 71 A.L.R.3d 6.

6-920. Liability insurance for state procured by division of insurance management [office of insurance management]. — No state agency or institution other than the administrator of the division of insurance management [office of insurance management] in the department of administration may procure liability insurance under this act. All state agencies and institutions shall comply with this act and the comprehensive liability plan developed by the administrator of the division.

History.
1971, ch. 150, § 20, p. 743; am. 1974, ch. 34, § 10, p. 988; am. 1974, ch. 252, § 8, p. 1674; am. 1976, ch. 310, § 2, p. 1069; am. 1980, ch. 106, § 2, p. 231.

STATUTORY NOTES

Compiler's Notes.
The bracketed insertions in the section heading and in the first sentence were added by the compiler to correct the referenced agency's name.

The words "this act" refer to S.L. 1971, ch.

150, which is compiled as §§ 6-901, 6-902, 6-904, 6-905, 6-906, 6-907 to 6-918, 6-919 to 6-925, 6-927, and 6-928. Probably, the reference should be to "this chapter," being chapter 9, title 6, Idaho Code.

6-921. Apportionment of cost of state plan. — The administrator of the division of insurance management [office of insurance management] in the department of administration shall apportion the cost of the comprehensive liability plan under this act to the individual agencies and institutions and the costs shall be paid to the departments.

History.
1971, ch. 150, § 21, p. 743; am. 1974, ch. 34, § 11, p. 988; am. 1974, ch. 252, § 9, p. 1674; am. 1976, ch. 310, § 3, p. 1069; am. 1980, ch. 106, § 3, p. 231.

STATUTORY NOTES

Compiler's Notes.
The bracketed insertion in the text was added by the compiler to correct the referenced agency's name.

The words "this act" refer to S.L. 1971, ch. 150, which is compiled as §§ 6-901, 6-902, 6-904, 6-905, 6-906, 6-907 to 6-918, 6-919 to 6-925, 6-927, and 6-928. Probably, the reference should be to "this chapter," being chapter 9, title 6, Idaho Code.

Effective Dates.
Section 15 of S.L. 1974, ch. 34 provided that the act should be in full force and effect on and after July 1, 1974.

Section 15 of S.L. 1974, ch. 252 provided the act should be in full force and effect on and after July 2, 1974.

6-922. Payment by state of claims or judgments when no insurance. — In the event no insurance has been procured by the state to pay a claim or judgment arising under the provisions of this act, the claim or judgment shall be paid from the next appropriation of the state instrumentality whose tortious conduct gave rise to the claim.

History.
1971, ch. 150, § 22, p. 743.

STATUTORY NOTES

Compiler's Notes.
The words "this act" refer to S.L. 1971, ch. 150, which is compiled as §§ 6-901, 6-902, 6-904, 6-905, 6-906, 6-907 to 6-918, 6-919 to 6-925, 6-927, and 6-928. Probably, the reference should be to "this chapter," being chapter 9, title 6, Idaho Code.

JUDICIAL DECISIONS

State's Right to Subrogation.
The state did not pay state university's debt to plaintiffs in a lawsuit as a mere volunteer, but in order to protect the state's assets in the state general fund; thus, the district court did not err in concluding that the state was entitled to equitable subrogation against university's insurer. State & Idaho State Univ. v. Continental Cas. Co., 126 Idaho 178, 879 P.2d 1111 (1994).

OPINIONS OF ATTORNEY GENERAL

A governmental entity, not the division of insurance management, has the duty to defend and indemnify its employees; thus, the question of whether or not the state or other governmental entity has liability insurance has no bearing on the question of whether or

not a government employee could be held personally liable for a money claim. OAG 86-2.

6-923. Authority of political subdivisions to purchase insurance. — All political subdivisions of the state shall have the authority to purchase the necessary liability insurance for themselves and their employees.

History.
1971, ch. 150, § 23, p. 743; am. 1976, ch. 310, § 4, p. 1069.

RESEARCH REFERENCES

Am. Jur. — 56 Am. Jur. 2d, Municipal Corporations, Counties and Other Political Subdivisions, § 189.

C.J.S. — 63 C.J.S., Municipal Corporations, § 980.

A.L.R. — Coverage and exclusions under liability policy issued to municipal corporation or similar governmental body. 23 A.L.R.3d 1282; 30 A.L.R.5th 699.

Validity and construction of statute authorizing or requiring governmental unit to procure liability insurance covering public officers or employees for liability arising out of performance of public duties. 71 A.L.R.3d 6.

Scope of provision in liability policy issued to municipal corporation or similar governmental body limiting coverage to injuries arising out of construction, maintenance, or repair work. 30 A.L.R.5th 699.

6-924. Policy limits — Minimum requirements. — Every policy or contract of insurance or comprehensive liability plan of a governmental entity as permitted under the provisions of this chapter shall provide that the insurance carrier pay on behalf of the insured governmental entity or its employee to a limit of not less than five hundred thousand dollars ($500,000) for bodily or personal injury, death, or property damage or loss as the result of any one (1) occurrence or accident, regardless of the number of persons injured or the number of claimants.

History.
1971, ch. 150, § 24, p. 743; am. 1976, ch. 309, § 14, p. 1062; am. 1976, ch. 310, § 5, p. 1069; am. 1984, ch. 96, § 1, p. 221.

STATUTORY NOTES

Effective Dates.
Section 4 of S.L. 1984, ch. 96 read: "This act shall be in full force and effect on and after October 1, 1984, and shall apply to all claims under the Idaho tort claims act which arise out of any accident occurring or any negligent or wrongful act or omission of any governmental entity or its employee committed on and after October 1, 1984."

JUDICIAL DECISIONS

No Bearing on Maximum Liability.
Since this section did not set out a maximum liability limit, but rather a minimum threshold, insurance policy which referred to this section in its liability limit clause was not bound to use the amount as it's maximum liability, but rather the liability amount actually purchased. Ferguson v. Coregis Ins. Co., 527 F.3d 930 (9th Cir. 2008).

6-925. Policy terms not complying with act — Construction — Exception. — Any insurance policy, rider or indorsement hereafter issued and purchased to insure against any risk which may arise as a result of the

application of this act, which contains any condition or provision not in compliance with the requirements of the act, shall not be rendered invalid thereby, but shall be construed and applied in accordance with such conditions and provisions as would have applied had such policy, rider or indorsement been in full compliance with this act, provided the policy is otherwise valid. The section shall not be construed to prohibit any such insurance policy, rider or indorsements from containing standard and customary exclusions of coverages which the insurance commissioner deems to be reasonable and prudent upon considering the availability and the cost of such insurance coverages.

History.
1971, ch. 150, § 25, p. 743.

STATUTORY NOTES

Compiler's Notes.
Pursuant to § 41-203, the reference to the insurance commissioner in the last sentence should be construed to mean the director of the department of insurance.

The words "this act" refer to S.L. 1971, ch. 150, which is compiled as §§ 6-901, 6-902, 6-904, 6-905, 6-906, 6-907 to 6-918, 6-919 to 6-925, 6-927, and 6-928. Probably, the reference should be to "this chapter," being chapter 9, title 6, Idaho Code.

6-926. Judgment or claims in excess of comprehensive liability plan — Reduction by court — Limits of liability. — The combined, aggregate liability of a governmental entity and its employees for damages, costs and attorney fees under this chapter, on account of bodily or personal injury, death, or property damage, or other loss as the result of any one (1) occurrence or accident regardless of the number of persons injured or the number of claimants, shall not exceed and is limited to five hundred thousand dollars ($500,000), unless the governmental entity has purchased applicable, valid, collectible liability insurance coverage in excess of said limit, in which event the controlling limit shall be the remaining available proceeds of such insurance. If any judgment or judgments, including costs and attorney fees that may be awarded, are returned or entered, and in the aggregate total more than five hundred thousand dollars ($500,000), or the limits provided by said valid, collectible liability insurance, if any, whether in one or more cases, the court shall reduce the amount of the award or awards, verdict or verdicts, or judgment or judgments in any case or cases within its jurisdiction so as to reduce said aggregate loss to said applicable statutory limit or to the limit or limits provided by said valid, collectible insurance, if any, whichever was [is] greater.

Limits of liability above specified shall not be increased or altered by the fact that a decedent, on account of whose death a wrongful death claim is asserted hereunder, left surviving him or her more than one (1) person entitled to make claim therefor, nor shall the aggregate recovery exceed the single limit provided for injury or death to any one (1) person in those cases in which there is both an injury claim and a death claim arising out of the injury to one (1) person, the intent of this section being to limit such liabilities and recoveries in the aggregate to one (1) limit only.

The entire exposure of the entity and its employee or employees hereunder shall not be enlarged by the number of liable employees or the theory of concurrent or consecutive torts or tort feasors or of a sequence of accidents or incidents if the injury or injuries or their consequences stem from one (1) occurrence or accident.

In no case shall any court enter judgment, or allow any judgment to stand, which results in the limit of liability herein provided to be exceeded in any manner or respect. If any court has jurisdiction of two (2) or more such claims in litigation in which the adjudication is simultaneous and, in the aggregate, exceeds the limits above provided, the reduction shall be pro rata in a proportion consistent with the relative amounts of loss of the claimants before the court; otherwise, the reduction shall be determined and made in view of limits remaining after the prior settlement of any other such claims or the prior satisfaction of any other such judgments, and no consideration shall be given to other such outstanding claims, if any, which have not been settled or satisfied prior thereto.

The court shall reduce any judgment in excess of the limits provided by this act in any matter within its jurisdiction, whether by reason of the adjudication in said proceedings alone or of the total or aggregate of all such awards, judgments, settlements, voluntary payments or other such loss relevant to the limits above provided.

History.

I.C., § 6-926, as added by 1984, ch. 96, § 3, p. 221.

STATUTORY NOTES

Prior Laws.

Former § 6-926 which comprised S.L. 1971, ch. 150, § 26, p. 743; am. 1976, ch. 309, § 15, p. 1062; am. 1976, ch. 310, § 6, p. 1069, was repealed by S.L. 1978, ch. 272, § 1.

Another former § 6-926, which comprised I.C., § 6-926, as added by 1978, ch. 272, § 7, p. 630, was repealed by S.L. 1984, ch. 96, § 2, effective October 1, 1984.

Compiler's Notes.

The bracketed word "is" in the last sentence of the first paragraph was inserted by the compiler.

The words "this act" in the last paragraph refer to S.L. 1984, ch. 96, which is compiled as §§ 6-924 and 6-926. Probably, the reference should be to "this chapter," being chapter 9, title 6, Idaho Code.

Effective Dates.

Section 4 of S.L. 1984, ch. 96 read: "This act shall be in full force and effect on and after October 1, 1984, and shall apply to all claims under the Idaho tort claims act which arise out of any accident occurring or any negligent or wrongful act or omission of any governmental entity or its employee committed on and after October 1, 1984."

JUDICIAL DECISIONS

Analysis

Applicability.

In suit involving injuries received in Idaho by a third party pursuant to a high speed chase initiated in in Utah, Idaho liability limits applied to Utah sheriff and the Utah county that employed him, since he was act-

ing as a servant of Idaho at the the time the injuries occurred. Athay v. Stacey, 142 Idaho 360, 128 P.3d 897 (2005).

Constitutionality.

The $100,000 recovery limitation under the Idaho Tort Claims Act was not unconstitutional on its face or as applied to recovery by parents of child killed by school bus since fair and substantial relationship existed between the limitation, upon which the school district based its insurance coverage, and the legislative objective of conserving public funds. Packard v. Joint Sch. Dist. No. 171, 104 Idaho 604, 661 P.2d 770 (Ct. App. 1983) (recovery limit now $500,000).

In General.

Prior to the abrogation of the sovereign immunity doctrine, generally no right of recovery against the state existed; the right to recover from the state is statutory. Leliefeld v. Johnson, 104 Idaho 357, 659 P.2d 111 (1983).

Legislative Intent.

Since the legislative history of former similar statute indicated that the legislature was aware that it was establishing a classification and did so deliberately and not as a result of accident or ignorance, it was logical to infer from the legislative intent to enact the recovery limitation and the state's purported objective to protect the public coffers, which was a reasonably conceived objective, that the recovery limitation had a rational basis and the recovery limitations of the section were not unconstitutional. Leliefeld v. Johnson, 104 Idaho 357, 659 P.2d 111 (1983).

The language of the 1978 amendments to former section, which was not a response to judicial interpretation and appeared to reflect the then existing practice, seemed to clearly reveal that legislative intent at all times was simply to place a cap on the state's liability rather than to prevent a plaintiff from demonstrating all items and amounts of damage which may have been suffered. Barringer v. State, 111 Idaho 794, 727 P.2d 1222 (1986).

Recovery Limitation.

Former similar provision did not permit a recovery of up to $300,000 to any one person where more than one person was making a claim. From the language of the statute and its legislative history, it was clear that the legislature intended to limit recovery to one person arising from personal injury or death to $100,000 unless the governmental entity had secured insurance coverage in excess of that amount. Leliefeld v. Johnson, 104 Idaho 357, 659 P.2d 111 (1983) (recovery limit now $500,000).

Under former similar statute there existed a valid relationship between the limitation on recoveries against the state and the avowed purpose of the statute which was to protect the public coffers. Leliefeld v. Johnson, 104 Idaho 357, 659 P.2d 111 (1983).

The recovery limitation under the Idaho Tort Claims Act may reflect two legislative purposes: (a) providing for effective risk management by public entities and their insurers, and (b) protecting the public coffers; these are legitimate, important state objectives. The first objective — risk management — does not favor any particular recovery limitation, but rather, it simply requires that recovery be restricted at some finite level so that risk exposure can be projected and informed underwriting decisions can be made; however, the second objective — conserving public funds — appears on its face to be directly related to the recovery limitation level selected since the greater the maximum allowable recovery, the greater annual expenditure must be made upon insurance premiums by the state and those political subdivisions which are not self-insured. Packard v. Joint Sch. Dist. No. 171, 104 Idaho 604, 661 P.2d 770 (Ct. App. 1983).

The $100,000 limitation in former law for "personal injury or death of any person" referred to the person injured or killed, and not the person claiming compensation as an heir; therefore, the limit of liability of the state as a result of any wrongful death of the decedent was $100,000, and that $100,000 limitation was not increased or altered by the fact the decedent left surviving him more than one person entitled to make claim therefor. Barringer v. State, 111 Idaho 794, 727 P.2d 1222 (1986) (recovery limit now $500,000).

Cited in: Sherrard v. City of Rexburg, 113 Idaho 815, 748 P.2d 399 (1988).

6-927. Tax levy to pay comprehensive liability plan. — Notwithstanding any provisions of law to the contrary, all political subdivisions shall have authority to levy an annual property tax in the amount necessary to provide for a comprehensive liability plan whether by the purchase of insurance or otherwise as herein authorized; provided, that the revenues derived therefrom may not be used for any other purpose.

History.

1971, ch. 150, § 27, p. 743; am. 1976, ch. 310, § 7, p. 1069; am. 1980, ch. 136, § 1, p. 297.; am. 1996, ch. 322, § 1, p. 1029.

OPINIONS OF ATTORNEY GENERAL

The attorney general opined that the proposed One Percent Initiative would undermine the ability of government to function in times of emergency and it would conflict with special levies to fund such unpredictable but legally-required items as tort claim judgments and catastrophic medical indigency bills. OAG 91-9.

6-928. Tax levy to pay claim or judgment. — Notwithstanding any provisions of law to the contrary and in the event there are no funds available, the political subdivision shall levy and collect a property tax, at the earliest time possible, in an amount necessary to pay a claim or judgment arising under the provisions of this act where the political subdivision has failed to purchase insurance or otherwise provide a comprehensive liability plan to cover a risk created under the provisions of this act.

History.
1971, ch. 150, § 28, p. 743; am. 1976, ch. 310, § 8, p. 1069; am. 1980, ch. 136, § 2, p. 297; am. 1996, ch. 322, § 2, p. 1029.

STATUTORY NOTES

Compiler's Notes.
The words "this act" refer to S.L. 1971, ch. 150, which is compiled as §§ 6-901, 6-902, 6-904, 6-905, 6-906, 6-907 to 6-918, 6-919 to 6-925, 6-927, and 6-928. Probably, the reference should be to "this chapter," being chapter 9, title 6, Idaho Code.

OPINIONS OF ATTORNEY GENERAL

A governmental entity, not the division of insurance management, has the duty to defend and indemnify its employees; thus, the question of whether or not the state or other governmental entity has liability insurance has no bearing on the question of whether or not a government employee could be held personally liable for a money claim. OAG 86-2.

6-929. Limitation of liability of volunteer firemen. — For the purposes of chapter 9, title 6, Idaho Code, a volunteer fireman is an employee of a governmental entity. A "volunteer fireman" means any person who contributes his services to a volunteer fire department organized pursuant to chapter 14, title 31, Idaho Code, or a county mutual fire insurance company organized pursuant to chapter 31, title 41, Idaho Code, or a volunteer fire association.

History.
I.C., § 6-929, as added by 1989, ch. 254, § 1, p. 629.

CHAPTER 10

MEDICAL MALPRACTICE

SECTION.

6-1001. Hearing panel for prelitigation consideration of medical malpractice claims — Procedure. — The Idaho state board of medicine, in alleged malpractice cases involving claims for damages against physicians and surgeons practicing in the state of Idaho or against licensed acute care general hospitals operating in the state of Idaho, is directed to cooperate in providing a hearing panel in the nature of a special civil grand jury and procedure for prelitigation consideration of personal injury and wrongful death claims for damages arising out of the provision of or alleged failure to provide hospital or medical care in the state of Idaho, which proceedings shall be informal and nonbinding, but nonetheless compulsory as a condition precedent to litigation. Proceedings conducted or maintained under the authority of this act shall at all times be subject to disclosure according to chapter 3, title 9, Idaho Code. Formal rules of evidence shall not apply and all such proceedings shall be expeditious and informal.

History.
1976, ch. 278, § 2, p. 953; am. 1990, ch. 213, § 5, p. 480.

STATUTORY NOTES

Cross References.
Medical Practice Act, § 54-1801 et seq.
State board of medicine, § 54-1805.

Legislative Intent.
Section 1 of S.L. 1976, ch. 278, read: "It is the declaration of the legislature that appropriate measures are required in the public interest to assure that a liability insurance market be available to physicians and hospitals in this state and that the same be available at reasonable cost, thus assuring the availability of such health care providers for the provision of care to persons in this state. It is, therefore, further declared to be in the public interest to encourage nonlitigation resolution of claims against physicians and hospitals by providing for prelitigation screening of such claims by a hearing panel as provided in this act."

Compiler's Notes.
The words "this act" refer to S.L. 1976, ch. 278, compiled as §§ 6-1001 to 6-1011.

JUDICIAL DECISIONS

Analysis

Filing.
Limitations period.
Preemption.

Filing.
While filing with the prelitigation screening panel pursuant to this section is a condition precedent to proceeding with district court litigation, such as filing interrogatories or setting trial dates, it is not a condition precedent to filing an action in order to toll the statute of limitations; therefore, there was no error in the district court's decision to stay the proceedings pursuant to § 6-1006 instead of

dismissing where the plaintiff's malpractice complaint was filed within the two year limitation period, but her request for a prelitigation screening panel was filed after the running of the limitation period. Moss v. Bjornson, 115 Idaho 165, 765 P.2d 676 (1988).

Limitations Period.

Family's medical malpractice suit against a hospital and doctors was properly dismissed as they failed to seek a stay until the prelitigation screening panel rendered its opinion and failed to effect service within six months pursuant to Idaho Civil Procedure Rule 4(a)(2). Rudd v. Merritt (In re Estate of Rudd), 138 Idaho 526, 66 P.3d 230 (2003).

Preemption.

The medical malpractice prelitigation statutes do not preempt application of the Idaho Tort Claims Act because both statutes are specific and serve different purposes. Mitchell v. Bingham Mem. Hosp., 130 Idaho 420, 942 P.2d 544 (1997).

Cited in: Masi v. Seale, 106 Idaho 561, 682 P.2d 102 (1984); Hirst v. St. Paul Fire & Marine Ins. Co., 106 Idaho 792, 683 P.2d 440 (Ct. App. 1984); Ogle v. De Sano, 107 Idaho 872, 693 P.2d 1074 (Ct. App. 1984); James v. Buck, 111 Idaho 708, 727 P.2d 1136 (1986); Keyser v. St. Mary's Hosp., 662 F. Supp. 191 (D. Idaho 1987); Vanvooren v. Astin, 141 Idaho 440, 111 P.3d 125 (2005).

RESEARCH REFERENCES

Am. Jur. — 61 Am. Jur. 2d, Physicians, Surgeons and Other Healers, § 346.

6-1002. Appointment and composition of hearing panel. — The board of medicine shall provide for and appoint an appropriate panel or panels to accept and hear complaints of such negligence and damages, made by or on behalf of any patient who is an alleged victim of such negligence. Said panels, shall include one (1) person who is licensed to practice medicine in the state of Idaho. In cases involving claims against hospitals, one (1) additional member shall be a then serving administrator of a licensed acute care general hospital in the state of Idaho. One (1) additional member of each such panel shall be appointed by the commissioners of the Idaho state bar, which person shall be a resident lawyer licensed to practice law in the state of Idaho, and shall serve as chairman of the panel. The panelists so appointed shall select by unanimous decision a layman panelist who shall not be a lawyer, doctor or hospital employee but who shall be a responsible adult citizen of Idaho. All panelists shall serve under oath that they are without bias or conflict of interest as respects any matter under consideration.

History.

1976, ch. 278, § 3, p. 953.

STATUTORY NOTES

Cross References.

Board of commissioners of Idaho state bar, § 3-401 et seq.

JUDICIAL DECISIONS

Cited in: Hirst v. St. Paul Fire & Marine Ins. Co., 106 Idaho 792, 683 P.2d 440 (Ct. App. 1984); James v. Buck, 111 Idaho 708, 727 P.2d 1136 (1986).

6-1003. Informal proceedings. — There shall be no record of such proceedings and all evidence, documents and exhibits shall, at the close thereof, be returned to the parties or witnesses from whom the same were secured. The hearing panel shall have the authority to issue subpoenas and to administer oaths; provided, the parties requesting the presentation of such proof shall provide the funds required to tender witness fees and mileage as provided in proceedings in district courts. Except upon special order of the panel, and for good cause shown demonstrating extraordinary circumstances, there shall be no discovery or perpetuation of testimony in said proceedings.

History.
1976, ch. 278, § 4, p. 953.

JUDICIAL DECISIONS

Cited in: James v. Buck, 111 Idaho 708, 727 P.2d 1136 (1986).

6-1004. Advisory decisions of panel. — At the close of proceedings the panel, by majority and minority reports or by unanimous report, as the case may be, shall provide the parties its comments and observations with respect to the dispute, indicating whether the matter appears to be frivolous, meritorious or of any other particular description. If the panel is unanimous with respect to an amount of money in damages that in its opinion should fairly be offered or accepted in settlement, it may so advise the parties and affected insurers or third-party payors having subrogation, indemnity or other interest in the matter.

History.
1976, ch. 278, § 5, p. 953.

JUDICIAL DECISIONS

Cited in: James v. Buck, 111 Idaho 708, 727 P.2d 1136 (1986); Moss v. Bjornson, 115 Idaho 165, 765 P.2d 676 (1988).

6-1005. Tolling of limitation periods during pendency of proceedings. — There shall be no judicial or other review or appeal of such matters. No party shall be obliged to comply with or otherwise [be] affected or prejudiced by the proposals, conclusions or suggestions of the panel or any member or segment thereof; however, in the interest of due consideration being given to such proceedings and in the interest of encouraging consideration of claims informally and without the necessity of litigation, the applicable statute of limitations shall be tolled and not be deemed to run during the time that such a claim is pending before such a panel and for thirty (30) days thereafter.

History.
1976, ch. 278, § 6, p. 953.

STATUTORY NOTES

Cross References.
Malpractice, statute of limitations, § 5-219.

Compiler's Notes.
The bracketed word "be" was inserted by the compiler.

JUDICIAL DECISIONS

Analysis

Action barred.
Action not barred.
Additional 30-day limitation.

Action Barred.
Family's medical malpractice suit against a hospital and doctors was properly dismissed as they failed to seek a stay until the prelitigation screening panel rendered its opinion and failed to effect service within six months pursuant to Idaho Civil Procedure Rule 4(a)(2). Rudd v. Merritt (In re Estate of Rudd), 138 Idaho 526, 66 P.3d 230 (2003).

Action Not Barred.
The plaintiff's medical malpractice action was not time barred, where the panel held hearings within 90 days from the date the claim was filed with the state board of medicine, but the panel did not reach a decision within 90 days, there was no evidence that the panel was unable to decide the issues before it or that the panel ever summarily concluded the proceedings, and the plaintiff filed her claim in district court within 30 days of the filing of the panel's decision. James v. Buck, 111 Idaho 708, 727 P.2d 1136 (1986).

Additional 30-Day Limitation.
The date of filing of the panel's decision and recommendations with the state board of medicine establishes the start of the additional 30-day tolling of the statute of limitations contemplated by the legislative scheme; if the panel is unable to decide the issues before it within 90 days, and it summarily concludes the proceedings, the date of filing a summary conclusion so advising the board of medicine and the parties shall be the date from which the additional 30 days of tolling will begin to run. James v. Buck, 111 Idaho 708, 727 P.2d 1136 (1986).

Cited in: Ogle v. De Sano, 107 Idaho 872, 693 P.2d 1074 (Ct. App. 1984).

6-1006. Stay of other court proceedings in interest of hearing before panel. — During said thirty (30) day period neither party shall commence or prosecute litigation involving the issues submitted to the panel and the district or other courts having jurisdiction of any pending such claims shall stay proceedings in the interest of the conduct of such proceedings before the panel.

History.
1976, ch. 278, § 7, p. 953.

JUDICIAL DECISIONS

Analysis

Action barred.
Filing.

Action Barred.
Family's medical malpractice suit against a hospital and doctors was properly dismissed as they failed to seek a stay until the prelitigation screening panel rendered its opinion and failed to effect service within six months pursuant to Idaho Civil Procedure Rule 4(a)(2). Rudd v. Merritt (In re Estate of Rudd), 138 Idaho 526, 66 P.3d 230 (2003).

Filing.
While filing with the prelitigation screening panel pursuant to § 6-1001 is a condition precedent to proceeding with district court litigation, such as filing interrogatories or setting trial dates, it is not a condition precedent to filing an action in order to toll the statute of limitations; therefore, there was no error in the district court's decision to stay the

proceedings, pursuant to this section instead of dismissing where the plaintiff's malpractice complaint was filed within the two year limitation period, but her request for a prelitigation screening panel was filed after the running of the limitation period. Moss v. Bjornson, 115 Idaho 165, 765 P.2d 676 (1988).

Cited in: James v. Buck, 111 Idaho 708, 727 P.2d 1136 (1986).

6-1007. Service of claim on accused provider of health care. — At the commencement of such proceedings and reasonably in advance of any hearing or testimony, the accused provider of health care in all cases shall be served a true copy of the claim to be processed which claim shall set forth in writing and in general terms, when, where and under what circumstances the health care in question allegedly was improperly provided or withheld and the general and special damages attributed thereto.

History.
1976, ch. 278, § 8, p. 953.

JUDICIAL DECISIONS

Cited in: James v. Buck, 111 Idaho 708, 727 P.2d 1136 (1986).

6-1008. Confidentiality of proceedings. — Neither party shall be entitled, except upon special order of the panel, to attend and participate in the proceedings which shall be subject to disclosure according to chapter 3, title 9, Idaho Code, and closed to public observation at all times, except during the giving of his or her own testimony or presentation of argument of his or her position, whether by counsel or personally; nor shall there be cross-examination, rebuttal or other customary formalities of civil trials and court proceedings. The panel itself may, however, initiate requests for special or supplemental participation, in particular respects and of some or all parties; and communications between the panel and the parties, excepting only the parties' own testimony on the merits of the dispute, shall be fully disclosed to all other parties.

History.
1976, ch. 278, § 9, p. 953; am. 1990, ch. 213, § 6, p. 480.

JUDICIAL DECISIONS

Cited in: James v. Buck, 111 Idaho 708, 727 P.2d 1136 (1986).

6-1009. Representation of parties by counsel. — Parties may be represented by counsel in proceedings before such panels, though it shall not be required.

History.
1976, ch. 278, § 10, p. 953.

6-1010. Fees for panel members. — The Idaho state board of medicine shall provide, by uniform policy of the board, for the payment of fees

and expenses of members of panels, such payment to be made from the state board of medicine fund created in section 54-1809, Idaho Code. Panel members shall serve upon the sworn commitment that all related matters shall be subject to disclosure according to chapter 3, title 9, Idaho Code, and privileged.

History.
1976, ch. 278, § 11, p. 953; am. 1979, ch. 177, § 1, p. 529; am. 1990, ch. 213, § 7, p. 480.

STATUTORY NOTES

Effective Dates.
Section 111 of S.L. 1990, ch. 213 as amended by § 16 of S.L. 1991, ch. 329 provided that §§ 3 through 45 and 48 through 110 of the act should take effect July 1, 1993 and that §§ 1, 2, 46 and 47 should take effect July 1, 1990.

6-1011. Limit on duration of proceedings — Panel's jurisdiction. — There shall be no repeat or reopening of panel proceedings. In no case shall a panel retain jurisdiction of any such claim in excess of ninety (90) days from date of commencement of proceedings. If at the end of such ninety (90) day period the panel is unable to decide the issues before it, it shall summarily conclude the proceedings and the members may informally, by written communication, express to the parties their joint and several impressions and conclusions, if any, albeit the same may be tentative or based upon admittedly incomplete consideration; provided, by written agreement of all parties the jurisdiction of the panel, if it concurs therein, may be extended and the proceeding carried on for additional periods of thirty (30) days.

History.
1976, ch. 278, § 12, p. 953.

JUDICIAL DECISIONS

ANALYSIS

Action Not Barred.
The plaintiff's medical malpractice action was not time-barred, where the panel held hearings within 90 days from the date the claim was filed with the state board of medicine, but the panel did not reach a decision within 90 days, there was no evidence that the panel was unable to decide the issues before it or that the panel ever summarily concluded the proceedings, and the plaintiff filed her claim in district court within 30 days of the filing of the panel's decision. James v. Buck, 111 Idaho 708, 727 P.2d 1136 (1986).

Additional 30-Day Limitation.
The date of filing of the panel's decision and recommendations with the state board of medicine establishes the start of the additional 30-day tolling of the statute of limitations contemplated by the legislative scheme; if the panel is unable to decide the issues before it within 90 days, and it summarily concludes the proceedings, the date of filing a summary conclusion so advising the board of medicine and the parties shall be the date from which the additional 30 days of tolling will begin to run. James v. Buck, 111 Idaho 708, 727 P.2d 1136 (1986).

Commencement of Proceedings.
The term "commencement of proceedings" in the second sentence of this section refers to the filing of a claim by an injured party.

James v. Buck, 111 Idaho 708, 727 P.2d 1136 (1986).

Termination of Jurisdiction.

In order for the panel's jurisdiction to be terminated, the panel file a report or it must find itself unable to decide the issues before it and summarily conclude the proceedings. James v. Buck, 111 Idaho 708, 727 P.2d 1136 (1986).

6-1012. Proof of community standard of health care practice in malpractice case. — In any case, claim or action for damages due to injury to or death of any person, brought against any physician and surgeon or other provider of health care, including, without limitation, any dentist, physicians' assistant, nurse practitioner, registered nurse, licensed practical nurse, nurse anesthetist, medical technologist, physical therapist, hospital or nursing home, or any person vicariously liable for the negligence of them or any of them, on account of the provision of or failure to provide health care or on account of any matter incidental or related thereto, such claimant or plaintiff must, as an essential part of his or her case in chief, affirmatively prove by direct expert testimony and by a preponderance of all the competent evidence, that such defendant then and there negligently failed to meet the applicable standard of health care practice of the community in which such care allegedly was or should have been provided, as such standard existed at the time and place of the alleged negligence of such physician and surgeon, hospital or other such health care provider and as such standard then and there existed with respect to the class of health care provider that such defendant then and there belonged to and in which capacity he, she or it was functioning. Such individual providers of health care shall be judged in such cases in comparison with similarly trained and qualified providers of the same class in the same community, taking into account his or her training, experience, and fields of medical specialization, if any. If there be no other like provider in the community and the standard of practice is therefore indeterminable, evidence of such standard in similar Idaho communities at said time may be considered. As used in this act, the term "community" refers to that geographical area ordinarily served by the licensed general hospital at or nearest to which such care was or allegedly should have been provided.

History.

1976, ch. 277, § 2, p. 951.

STATUTORY NOTES

Legislative Intent.

Section 1 of S.L. 1976, ch. 277, read: "It is the declaration of the legislature that appropriate measures are required in the public interest to assure that a liability insurance market be available to physicians, hospitals and other health care providers in this state and that the same be available at reasonable cost, thus assuring the availability of such health care providers for the provision of care to persons in the state. It is, therefore, further declared to be in the public interest that the liability exposure of such health care providers be limited and made more definable by a requirement for direct proof of departure from a community standard of practice."

Compiler's Notes.

The words "this act" refer to S.L. 1976, ch. 277, compiled as §§ 6-1012 and 6-1013.

JUDICIAL DECISIONS

ANALYSIS

Attorney Fees on Appeal.

Where evidence suggested strongly that plaintiff herself believed the accident was covered by this section and it was not until she was left without an expert to support her position that she developed the theory — a theory which goes against the clear and unambiguous language of the statute and a theory for which plaintiff cannot find support for in any language in the statute, its legislative history, or Idaho case law — that she now presents on appeal, the court found such appeal frivolous, unreasonable and without foundation and awarded reasonable attorney fees to the respondents. Hough v. Fry, 131 Idaho 230, 953 P.2d 980 (1998).

Burden on Claimants.

Even assuming that utilization of res ipsa loquitur is now precluded by the statutory language of this section which states that in a claim for damages in a medical malpractice action, the "plaintiff must, as an essential part of his or her case in chief, affirmatively prove by direct expert testimony ...," this section did not retroactively change the burden on plaintiffs in a malpractice action involving an unsuccessful inner ear operation since the doctrine of res ipsa loquitur would not apply to such case even under the prior case law. LePelley v. Grefenson, 101 Idaho 422, 614 P.2d 962 (1980).

Under this section, plaintiff suing for malpractice had to affirmatively prove by direct expert testimony and by a preponderance of all the competent evidence that the defendant physician negligently failed to meet the applicable standard of health care practice of the community in which the care was provided at the time that care was given. Bolen v. United States, 727 F. Supp. 1346 (D. Idaho 1989).

Causation.

Unlike the elements of duty and breach of duty, there is no statutory requirement explicitly stating that proximate cause in medical malpractice cases must be shown by direct expert testimony; therefore, testimony admissible to show proximate cause in a medical malpractice case, like any other case, is governed by the rules of evidence regarding opinion testimony by lay witnesses and experts under Idaho Rules of Evidence 701 and 702. Sheridan v. Saint Luke's Reg'l Med. Ctr., 135 Idaho 775, 25 P.3d 88 (2001).

Constitutionality.

This section and § 6-1013, in establishing a standard of medical care based on the local community, do not create a classification which rests on grounds wholly irrelevant to the achievement of the state's objective and, therefore, such statutes do not violate the equal protection clause of either the United States Constitution or the Idaho Constitution. LePelley v. Grefenson, 101 Idaho 422, 614 P.2d 962 (1980).

This section and § 6-1013 did not retroactively establish a different burden of proof that must be met to sustain an action for medical malpractice, thereby violating Idaho Const., art. 11, § 12, by providing: (1) that the

standard of practice and the failure of the medical person to meet the standard must be established by expert testimony and (2) that the standard of care shall be that of the local community, since both were the standards before the enactment of the statutes; the legislature merely codified already existing case law. LePelley v. Grefenson, 101 Idaho 422, 614 P.2d 962 (1980).

Requiring that medical malpractice plaintiffs establish a violation of the local standard of medical care as part of their prima facie case does not violate the due process requirements of either the Idaho or United States constitutions. Gubler ex rel. Gubler v. Brydon, 125 Idaho 107, 867 P.2d 981 (1994).

Doctrine of Informed Consent.

To establish a claim based on the doctrine of informed consent, a patient must prove three basic elements: nondisclosure, causation and injury. In order to show causation, the patient must prove that if he had been informed of the material risks, he would not have consented to the procedure, and that he had been injured as a result of submitting to the medical procedure. Sherwood v. Carter, 119 Idaho 246, 805 P.2d 452 (1991).

Effect of § 39-1391c.

By enacting § 39-1391c the legislature was simply trying to encourage doctors of all specialties and trainings to render emergency medical care and first aid services; it was not attempting to affect or change the standard of care of liability of physicians in the ordinary doctor/patient relationship, which is governed by § 6-1013 and this section. Eby ex rel. Eby v. Newcombe, 116 Idaho 838, 780 P.2d 589 (1989).

Evidence.

Under this section and § 6-1013 there must be evidence not only on the standard of care, but also on the technology and medical resources available in a particular community. Buck v. St. Clair, 108 Idaho 743, 702 P.2d 781 (1985).

Where in opposition to defendants' motions for summary judgment in a medical malpractice action plaintiffs submitted two affidavits of physicians, both practicing outside the state that the surgery should have been postponed and that it was a departure from optimal patient care to not postpone an elective surgery under such circumstances, neither affidavit demonstrated any knowledge of the applicable standard of care in the local community and was wholly insufficient to satisfy the burden of plaintiffs at the summary judgment juncture in a medical malpractice action. Dekker v. Magic Valley Regional Medical Ctr., 115 Idaho 332, 766 P.2d 1213 (1988).

This section requires as an essential part of plaintiffs' case, affirmative proof that defendant failed to meet the applicable standard of health care practice in the community in which the care was, or should have been, provided. Health care providers are to be judged in comparison with similarly trained and qualified providers of the same class in the same community. Dekker v. Magic Valley Regional Medical Ctr., 115 Idaho 332, 766 P.2d 1213 (1988).

Summary judgment in a medical malpractice suit was properly granted in favor of the defendant hospital where the record established that, during thoracic surgery, hospital personnel met the applicable standard of care for measuring urinary output when a nurse measured the output every one-quarter hour during the critical cross-clamping phase of the surgery and verbally announced the measurements every time they registered zero and where the plaintiffs were only able to put into the record that the surgeons did not remember the audible announcement. Sparks v. St. Luke's Regional Medical Ctr., Ltd., 115 Idaho 505, 768 P.2d 768 (1988).

Summary judgment in a medical malpractice suit was properly granted in favor of defendant hospital where the record established that the standard of care applicable to hospital personnel regarding a ventilator extubation was simply to follow the attending physician's orders and that the standard was met, and where plaintiffs' primary witness recognized that the standard of care was met but criticized the staff for not going beyond their authority by questioning the attending doctor's orders. Sparks v. St. Luke's Regional Medical Ctr., Ltd., 115 Idaho 505, 768 P.2d 768 (1988).

Subsection (7) of § 54-1814 is not unconstitutionally vague on its face, even though the board of professional discipline has not promulgated any regulations to further define or explain it. The language is similar to the well-accepted definition of medical malpractice contained in this section and is a codification of existing case law and, therefore, was sufficient to notify medical practitioners that they could be disciplined for failure to conform to the community standards; moreover, finding that physician had violated existing community standards came directly from the board which is comprised of members of the medical community who possess the expertise born of personal knowledge and experience, the utilization of which in the evaluation of evidence is specifically permitted by § 67-5251. Krueger v. Board of Professional Discipline, 122 Idaho 577, 836 P.2d 523 (1992), cert. denied, 507 U.S. 918, 113 S. Ct. 1277, 122 L. Ed. 2d 672 (1993).

In malpractice suit against optometrist, testimony of ophthalmologist that was insufficient to comply with this section and § 6-1013 since ophthalmologist professed to have

no knowledge of the community standard of care with respect to the practice of optometry. Evans v. Griswold, 129 Idaho 902, 935 P.2d 165 (1997).

In medical malpractice action, where local doctor testified as to the standard of care in the relevant community at the time of defendant's alleged malpractice and, thus, the local standard of care was determinable, court did not err in not allowing plaintiff to establish the standard of care by reference to the standard in similar communities. Morris ex rel. Morris v. Thomson, 130 Idaho 138, 937 P.2d 1212 (1997).

Section 6-1013 did not modify the portion of this section which permits plaintiffs to refer to the standard of care in similar communities when the standard of care in the same community is indeterminable. Morris ex rel. Morris v. Thomson, 130 Idaho 138, 937 P.2d 1212 (1997).

Expert Witness.

Although this section requires a plaintiff, as part of his case in chief, to obtain an expert to testify as to the standard of health care, obtaining this expert is not a prerequisite to the filing of an action. It is only in the plaintiff's case in chief, or in opposition to a summary judgment motion, if one is filed, that the plaintiff must produce such expert. Badell v. Beeks, 115 Idaho 101, 765 P.2d 126 (1988).

Since § 6-1013 requires an expert witness to possess professional knowledge and expertise coupled with actual knowledge of the applicable community standard, and because the phrase "coupled with" denotes a contemporaneous relationship, awareness of the standard must exist when the expert testimony is given; if contemporaneous awareness is not demonstrated, the expert's testimony is subject to being excluded or stricken at trial, and such evidence is not entitled to evidentiary weight in summary judgment proceedings. Kunz v. Miciak, 118 Idaho 130, 795 P.2d 24 (Ct. App. 1990).

It was not established through the plaintiff's expert testimony or the defendant/physician that defendant was aware of the bladder infection or that it was a violation of the standard of care for him not to be aware of these facts under the circumstances. Gubler v. Boe, 120 Idaho 294, 815 P.2d 1034 (1991).

There was no basis for a claim that the district court abused its discretion in denying the plaintiffs' motion for a continuance where the plaintiffs had ample time prior to trial to prepare their witness regarding the local community standard of care, the trial court allowed one limited continuance, and plaintiffs had additional opportunity during recesses to contact other doctors to qualify their expert during the course of the trial. Gubler v. Boe, 120 Idaho 294, 815 P.2d 1034 (1991).

The district court erred by striking plaintiff's expert's testimony that the local standard of care was violated when doctor failed to determine that fetus was a macrosomic baby which could have been accomplished by the use of ultrasound or biophysical testing. Kozlowski v. Rush, 121 Idaho 825, 828 P.2d 854 (1992).

Expert witness physician's affidavits did not comply with this rule because they did not affirmatively show that he possessed the professional knowledge and expertise to testify to the hospital's standard of care, as affidavits did not state he was trained as hospital administrator or experienced in hospital management. Dunlap ex rel. Dunlap v. Garner, 127 Idaho 599, 903 P.2d 1296 (1995).

It is sufficient for out-of-state expert to gain the requisite familiarity with the standards of the community by conferring with local authorized personnel and stating that the standard did not deviate from the national standard. Dunlap ex rel. Dunlap v. Garner, 127 Idaho 599, 903 P.2d 1296 (1995).

The sworn statements of expert witness physician taken as true were sufficient to qualify him to express an expert opinion relative to the local area standard of care that was applicable and whether it was or was not adhered to by treating physician for purposes of summary judgment and the district court determination that expert witness physician's testimony was not admissible for purposes of summary judgment was in error. Dunlap ex rel. Dunlap v. Garner, 127 Idaho 599, 903 P.2d 1296 (1995).

This section should not be read to require expert testimony every time a provider of medical care is sued for negligence. There are circumstances where the alleged act of negligence is so far removed or unrelated to provision of medical care that this section would not apply. Hough v. Fry, 131 Idaho 230, 953 P.2d 980 (1998).

Summary judgment on the issue of causation in the patient's medical malpractice claim was improperly granted to doctors where the plaintiff's expert's affidavit created a genuine issue of material fact regarding negligent performance of surgery. Anderson v. Hollingsworth, 136 Idaho 800, 41 P.3d 228 (2001).

Court properly found that patient had not laid adequate foundation for testimony of a medical expert in a malpractice action against an emergency room doctor where the patient's expert did not know the appropriate standard of care for emergency room doctors. Dulaney v. St. Alphonsus Reg'l Med. Ctr., 137 Idaho 160, 45 P.3d 816 (2002).

This section required that direct expert testimony was necessary to establish the community standard of health care in a medical or dental malpractice action, and the affida-

vits of a patient's expert should have been admitted because they met the requirements of Idaho Civil Procedure Rule 56(e). Grover v. Smith, 137 Idaho 247, 46 P.3d 1105 (2002).

In medical malpractice action, summary judgment was improperly granted to doctor. Trial court improperly disregarded plaintiff's expert's supplemental affidavit regarding his familiarity with the local standard of care even though affidavit possibly conflicted with his earlier deposition testimony. Mains v. Cach, 143 Idaho 221, 141 P.3d 1090 (2006).

The admissibility of expert testimony is a matter committed to the discretion of the trial court, and the court's ruling will not be overturned absent an abuse of that discretion. The sequence of inquiry to determine if there has been an abuse of discretion is: (1) whether the court correctly perceived the issue as one of discretion; (2) whether the court acted within the outer boundaries of its discretion and consistently with the applicable legal standards; and (3) whether the court reached its decision by an exercise of reason. Jones v. Crawforth, 147 Idaho 11, 205 P.3d 660 (2009).

Opinions of expert witnesses are allowable when it is the community standard of care that is the focus of their testimony. The district court properly allowed two experts to testify as to what conduct they would characterize as reaching a level of negligence that they saw as reckless. This testimony was permissible because (1) the experts had acquainted themselves adequately with the community standard for health care providers, and (2) their opinions as to the level of negligence of specific actions of a health care provider were not conclusions that the average juror would be qualified to draw. Jones v. Crawforth, 147 Idaho 11, 205 P.3d 660 (2009).

Health Care Provider.

A cell saver technician is a health care provider under this section and, therefore, her liability must be based upon the community health care standard provided for in this section. Jones v. Crawforth, 147 Idaho 11, 205 P.3d 660 (2009).

Hospital Liability.

The hospital could not be liable for any malpractice of the physician unless the physician acted as an employee and could be negligent only for acts or omissions of its agents and employees. Keyser v. St. Mary's Hosp., 662 F. Supp. 191 (D. Idaho 1987).

Hospital could be found vicariously liable for the negligence of an independently contracted cell saver technician under Idaho's doctrine of apparent agency. The extension of apparent agency to medical malpractice claims is consistent with the provision for vicarious liability set forth in this section. Jones v. Healthsouth Treasure Valley Hosp., 147 Idaho 109, 206 P.3d 473 (2009).

Indeterminable Standard.

Because defendant doctor was one of only six cardiovascular surgeons in the state of Idaho and all six of these cardiovascular surgeons practiced together in Boise as a professional association, the standard of health care practice in the community ordinarily served by hospital was indeterminable and no "similar Idaho communities" existed about which plaintiff could have presented evidence of the standard of practice for a cardiovascular surgeon performing patent ductus arteriosus surgery; therefore, this section and § 6-1013 did not provide a means of establishing the applicable standard of practice in this case; in resolving whether out-of-state doctor qualified as an expert witness to testify on plaintiff's behalf, the court turned to decisions predating the enactment of this section and § 6-1013. Hoene v. Barnes, 121 Idaho 752, 828 P.2d 315 (1992).

Instructions.

In a medical malpractice action, the instruction which stated that the performance of a board-certified specialist physician is to be measured against the local community standard was not erroneous. Grimes v. Green, 113 Idaho 519, 746 P.2d 978 (1987).

The combination of instructions on negligence was proper, where it sufficiently informed the jury of the legal standard contained in this section. Smallwood v. Dick, 114 Idaho 860, 761 P.2d 1212 (1988).

The given instructions in a medical malpractice action were based upon the legislative standards set forth in this section, and, accordingly, there was no error committed by the trial court in the instructions given or in refusing appellants' requested negligence instructions. Robertson v. Richards, 115 Idaho 628, 769 P.2d 505 (1989).

The fact that the instructions did not follow the exact language of this section and erroneously defined "community" for the purpose of determining whether the physician's disclosures were adequate did not result in prejudice to plaintiff, and although not technically correct, the instructions did not constitute reversible error. Sherwood v. Carter, 119 Idaho 246, 805 P.2d 452 (1991).

A former Idaho Jury Instruction 230 correctly stated the proper proximate cause instruction under the circumstances of this case; therefore, in an action for medical malpractice when there is evidence of two or more causes that contributed to the damage suffered, for only one of which the doctor is responsible, the proper proximate cause instruction should instruct the jury that any negligence of the doctor was a proximate cause of the injury if it was a substantial factor in bringing about the damage, and the supreme court specifically rejected the inclu-

sion of an instruction under these circumstances requiring the claimant to prove that the injury would not have occurred "but for" the doctor's negligence. Fussell v. St. Clair, 120 Idaho 591, 818 P.2d 295 (1991).

By enacting this section, the legislature replaced the applicable standard of care then in effect with a new standard and, pursuant to this new standard, the jury instruction given by the court inaccurately stated the applicable Idaho Law by incorporating "best judgment" in the standard of care for medical malpractice. Leazer v. Kiefer, 120 Idaho 902, 821 P.2d 957 (1991).

In malpractice action, district court properly instructed the jury regarding the standard of care in medical malpractice cases where the language of the instruction mirrored the language of this section and the portion of the instruction limiting the consideration of the standard of care in similar communities to situations in which the local standard within the community is indeterminable was correct. Morris ex rel. Morris v. Thomson, 130 Idaho 138, 937 P.2d 1212 (1997).

The wording "all competent evidence" is a legally sufficient instruction in a medical malpractice claim. Perry v. Magic Valley Reg'l Med. Ctr., 134 Idaho 46, 995 P.2d 816 (2000).

In medical malpractice action, district court did not err in refusing defendant doctor's proferred standard of care instruction; reviewing court declined to address whether proferred instruction was erroneous, since instructions actually given by trial court adequately covered the requisite elements. Puckett v. Verska, 144 Idaho 161, 158 P.3d 937 (2007).

In a medical malpractice action, the trial court did not err in declining to give plaintiffs' proposed instruction on negligence per se because the instruction was an erroneous statement of law; the instruction that the trial court gave properly and adequately stated the statutory requirements for proving negligence. Schmechel v. Dille, — Idaho —, 219 P.3d 1192 (2009).

Knowledge of Community Standard.

Because there was no indication that expert inquired of a local doctor, and plaintiff did not state that the local standard of care was the same as the national standard, there was not sufficient foundation in expert's affidavit to show that expert had actual knowledge of the applicable community standard. Rhodehouse v. Stutts, 125 Idaho 208, 868 P.2d 1224 (1994).

Medical Texts.

Overlapping references by defendant-physician and by plaintiff's out-of-state medical expert to a common medical text did not necessarily demonstrate a complete alignment of views on the applicable community medical standard. Kunz v. Miciak, 118 Idaho 130, 795 P.2d 24 (Ct. App. 1990).

National Standard of Care.

In a medical malpractice action, the argument that there is but one national standard of care for board-certified specialists and that any community standard is superfluous is not without merit, however, it flies in the face of § 6-1013 and has been rejected by the Idaho Supreme Court. Kunz v. Miciak, 118 Idaho 130, 795 P.2d 24 (Ct. App. 1990).

A national standard of care is not automatically implicated simply because the federal government has created a general regulatory scheme for a given area of medicine; thus, in a medical malpractice action, the testimony of the plaintiffs' expert witness was properly excluded, where he failed to establish that he had actual knowledge of the applicable community standard of care. McDaniel v. Inland Northwest Renal Care Group-Idaho, L.L.C., 144 Idaho 219, 159 P.3d 856 (2007).

Nationally Board-Certified Specialists.

The legislature intended that nationally board-certified specialists can testify regarding the standard of care against other nationally board-certified specialists practicing in the same area of medicine; the residence of a board-certified physician should not be a basis for precluding his testimony. Buck v. St. Clair, 108 Idaho 743, 702 P.2d 781 (1985).

An out-of-state, board-certified orthopedic surgeon's naked assertion that because he was familiar with the national standard of care he was also familiar with what was expected of an instate board-certified orthopedic surgeon was totally insufficient to render him competent to testify concerning the applicable standard of care in a medical malpractice suit against an instate surgeon. Strode v. Lenzi, 116 Idaho 214, 775 P.2d 106 (1989).

An expert from outside the state must demonstrate that he possesses knowledge of the local community standard. If he is board-certified in the same specialty, he must, at a minimum, inquire of a local specialist to determine whether the local community standard varies from the national standard for that board-certified specialty. Strode v. Lenzi, 116 Idaho 214, 775 P.2d 106 (1989).

Non-Certified Physician.

To fulfill the requirement of presenting expert testimony in a medical malpractice case against a board-certified specialist, plaintiff may offer the testimony of a physician who is not board-certified in the same specialty as the defendant physician, so long as the testimony complies with the requirements of this section and § 6-1013. Pearson v. Parsons, 114 Idaho 334, 757 P.2d 197 (1988).

In a medical malpractice action against a

board-certified pediatrician and a board-certified surgeon, the affidavit of a doctor who was not board-certified in either pediatrics or surgery was sufficient to raise a genuine issue of material fact and to defeat the motion for summary judgment of the defendants where he demonstrated that he was judging the defendants in comparison with similarly trained and qualified physicians in the same community, taking into account their training, experience, and fields of medical specialization, he was a knowledgeable, competent expert witness, he actually held an opinion about the applicable standard of practice and the failure of the defendants to meet the standard, his opinion was rendered with reasonable medical certainty, and he possessed professional knowledge and expertise coupled with actual knowledge of the applicable community standard to which his expert opinion testimony was addressed. Pearson v. Parsons, 114 Idaho 334, 757 P.2d 197 (1988).

Person.

Although a hospital is not a natural person, it generally falls under the definition of "person" set forth in this section as an entity that is recognized by law as having the rights and duties as a human being. Jones v. Healthsouth Treasure Valley Hosp., 147 Idaho 109, 206 P.3d 473 (2009).

"Provision of Health Care".

This section requires plaintiffs to provide expert testimony in any action arising on account of the provision or failure to provide health care. The language of this section clearly treats the provision of health care as a single act and not a series of steps, each of which must be analyzed to determine if it involved professional judgment. Hough v. Fry, 131 Idaho 230, 953 P.2d 980 (1998).

Res Ipsa Loquitur Inapplicable.

The doctrine of res ipsa loquitur may not be used to prove negligence in a medical malpractice action in Idaho, given this section's requirement of direct expert testimony. Kolln v. Saint Luke's Reg'l Med. Ctr., 130 Idaho 323, 940 P.2d 1142 (1997).

Standard of Care.

Physician treating a patient in a nursing facility is not free to adopt a standard of care lower than that required of the nursing home in which the provider works. If the physician is functioning both as treating physician and as medical director of the facility, his standard of care includes the minimum standards set by applicable state and federal law. Hayward v. Jack's Pharm., Inc., 141 Idaho 622, 115 P.3d 713 (2005).

Summary judgment for physicians in a medical malpractice case was proper when a patient's survivor called an expert witness who was from outside of the state, but the survivor failed to establish if the expert was familiar with the standard of care for the community. Ramos v. Dixon, 144 Idaho 32, 156 P.3d 533 (2007).

Summary Judgment.

There were no facts presented as to a doctor's negligence such as to withstand a motion for summary judgment in a malpractice suit, where affidavits indicated that the doctor had performed an inner ear operation within the standard of care of the community, and where nothing was offered to refute this testimony other than the facts that a bone fragment was dropped into the ear and that the operation was not a success. LePelley v. Grefenson, 101 Idaho 422, 614 P.2d 962 (1980).

Where defendant doctor stated to plaintiff's husband that he had "obviously messed up" laparoscopic tubal ligation surgical procedure and did not bill plaintiff for additional surgery to correct hole burned in plaintiff's small intestine, this was not sufficient evidence that defendant failed to meet the applicable standard of health care practice in the community under this section and § 6-1013, thus summary judgment for defendants was not precluded. Maxwell v. Women's Clinic P.A., 102 Idaho 53, 625 P.2d 407 (1981).

In support of the motion for summary judgment in a medical malpractice action, the affidavits of the expert witnesses offered in support of the motion for summary judgment were devoid of statements indicating actual knowledge of the standard of practice in the community; therefore, the burden never shifted to the plaintiffs to show that there was a genuine issue for trial. Pearson v. Parsons, 114 Idaho 334, 757 P.2d 197 (1988).

In granting summary judgment in favor of dentist in an action by patient for medical malpractice, trial court erred in rejecting affidavit of patient's expert witness, which stated the witness had familiarized himself with the local community standard of care and which provided a factual background to support his familiarization; trial court erroneously involved itself in weighing conflicting evidence rather than in determining whether, for purposes of surviving summary judgment, the affidavit had offered sufficient evidence. Watts v. Lynn, 125 Idaho 341, 870 P.2d 1300 (1994).

District court erred by striking the patient's experts' affidavits and granting summary judgment to the physician; because one expert's significant amount of experience demonstrated the requisite personal knowledge of the relevant standard of care in the area at the time of the patient's surgery, his affidavit was admissible, and the other expert's fourth affidavit was admissible, as it satisfied the requirement that an out-of-area expert obtain

knowledge of the local standard of care by consulting with a doctor familiar with the local standard of care. Shane v. Blair, 139 Idaho 126, 75 P.3d 180 (2003).

In a medical malpractice case, a court erred by granting summary judgment to a hospital where statements indicating that plaintiff's expert familiarized himself with local standard of care by contacting a local pharmacist and statements that there was a national standard of care were sufficient to lay the foundation for the expert's testimony. Additionally, the hospital's expert stated that: "many of the statements made by plaintiff's experts regarding the local standard of care for Gentamicin use in 2000 are incorrect;" that statement alone showed that there was a genuine issue of material fact regarding the standard of care for the hospital in 2000. Edmunds v. Kraner, 142 Idaho 867, 136 P.3d 338 (2006).

Vicarious Liability.

Although the term "vicarious liability" is not defined under Idaho's Medical Malpractice Act, § 6-1001et seq., it is defined generally as liability that a supervisory party bears for the actionable conduct of a subordinate or associate based on the relationship between the two parties. Jones v. Healthsouth Treasure Valley Hosp., 147 Idaho 109, 206 P.3d 473 (2009).

When Applicable.

There is nothing in this section or the legislative intent behind it to indicate that the type of negligence, ordinary or professional, has anything to do with the application of this section. Rather, by its plain and unambiguous language, this section applies when the damages complained of result from providing or failing to provide health care. Thus, to determine if this section applies, courts need only look to see if the injury occurred on account of the provision of, or failure to provide, health care. Hough v. Fry, 131 Idaho 230, 953 P.2d 980 (1998); Jones v. Crawforth, — Idaho —, 206 P.3d 660 (2009).

Cited in: Hirst v. St. Paul Fire & Marine Ins. Co., 106 Idaho 792, 683 P.2d 440 (Ct. App. 1984); Rook v. Trout, 113 Idaho 652, 747 P.2d 61 (1987); Hilden v. Ball, 117 Idaho 314, 787 P.2d 1122 (1989); Litz v. Robinson, 131 Idaho 282, 955 P.2d 113 (Ct. App. 1997); Shannahan v. Gigray, 131 Idaho 664, 962 P.2d 1048 (1998); Dunlap v. Cassia Mem. Hosp. & Med. Ctr., 134 Idaho 233, 999 P.2d 888 (2000); Laurino v. Bd. of Prof'l Discipline, 137 Idaho 596, 51 P.3d 410 (2002).

RESEARCH REFERENCES

Am. Jur. — 61 Am. Jur. 2d, Physicians, Surgeons and Other Healers, §§ 200 to 202, 329.

C.J.S. — 70 C.J.S., Physicians and Surgeons, § 134.

A.L.R. — Locality rule as governing hospital's standard of care to patient and expert's competency to testify thereto. 36 A.L.R.3d 440.

Standard of care owed to patient by medical specialist as determined by local, "like community," state, national, or other standards. 18 A.L.R.4th 603.

Liability of dentist for extraction of teeth — Lack of informed consent. 125 A.L.R.5th 403.

6-1013. Testimony of expert witness on community standard. — The applicable standard of practice and such a defendant's failure to meet said standard must be established in such cases by such a plaintiff by testimony of one (1) or more knowledgeable, competent expert witnesses, and such expert testimony may only be admitted in evidence if the foundation therefor is first laid, establishing (a) that such an opinion is actually held by the expert witness, (b) that the said opinion can be testified to with reasonable medical certainty, and (c) that such expert witness possesses professional knowledge and expertise coupled with actual knowledge of the applicable said community standard to which his or her expert opinion testimony is addressed; provided, this section shall not be construed to prohibit or otherwise preclude a competent expert witness who resides elsewhere from adequately familiarizing himself with the standards and practices of (a particular) such area and thereafter giving opinion testimony in such a trial.

History.
1976, ch. 277, § 3, p. 951.

STATUTORY NOTES

Compiler's Notes.
The words "a particular" in the proviso were enclosed in parentheses as surplusage.

Section 4 of S.L. 1976, ch. 277, read: "This act shall apply retroactively as respects all claims heretofore accrued and also to acts, errors or omissions heretofore or hereafter occurring."

Effective Dates.
Section 5 of S.L. 1976, ch. 277 declared an emergency. Approved March 31, 1976.

JUDICIAL DECISIONS

Analysis

Apparent Agency.
Extension of apparent agency to medical malpractice claims does not change the standard for establishing negligence on the part of a healthcare provider; rather, it provides an additional basis from which the hospital's liability can arise. When a hospital is being sued in its capacity as an individual healthcare provider, the plaintiff is still required to prove that the hospital breached the applicable standard of care. Jones v. Healthsouth Treasure Valley Hosp., 147 Idaho 109, 206 P.3d 473 (2009).

Constitutionality.
Section 6-1012 and this section, in establishing a standard of medical care based on the local community, do not create a classification which rests on grounds wholly irrelevant to the achievement of the state's objective and, therefore, such statutes do not violate the equal protection clause of either the United States Constitution or the Idaho Constitution. LePelley v. Grefenson, 101 Idaho 422, 614 P.2d 962 (1980).

Section 6-1012 and this section did not retroactively establish a different burden of proof that must be met to sustain an action for medical malpractice, thereby violating Idaho Const., art. 11, § 12, by providing: (1) that the standard of practice and the failure of the medical person to meet the standard must be established by expert testimony and (2) that the standard of care shall be that of the local community; both were the standards before the enactment of the statutes, and the legislature merely codified already existing case law. LePelley v. Grefenson, 101 Idaho 422, 614 P.2d 962 (1980).

Construction With Other Law.
This section does not modify the portion of § 6-1012 which permits plaintiffs to refer to the standard of care in similar communities when the standard of care in the same community is indeterminable. Morris ex rel. Morris v. Thomson, 130 Idaho 138, 937 P.2d 1212 (1997).

Discretion of Court.
The admissibility of expert testimony is a matter committed to the discretion of the trial court, and the court's ruling will not be overturned absent an abuse of that discretion. The

sequence of inquiry to determine if there has been an abuse of discretion is: (1) whether the court correctly perceived the issue as one of discretion; (2) whether the court acted within the outer boundaries of its discretion and consistently with the applicable legal standards; and (3) whether the court reached its decision by an exercise of reason. Jones v. Crawforth, 147 Idaho 11, 205 P.3d 660 (2009).

Effect of § 39-1391c.

By enacting § 39-1391c the legislature was simply trying to encourage doctors of all specialties and trainings to render emergency medical care and first aid services; it was not attempting to affect or change the standard of care of liability of physicians in the ordinary doctor/patient relationship, which is governed by § 6-1012 and this section. Eby ex rel. Eby v. Newcombe, 116 Idaho 838, 780 P.2d 589 (1989).

Evidence of Resources Available.

Under § 6-1012 and this section, there must be evidence not only on the standard of care, but also on the technology and medical resources available in a particular community. Buck v. St. Clair, 108 Idaho 743, 702 P.2d 781 (1985).

Expert Qualified.

Expert was qualified to testify as an expert regarding the standard of a certified registered nurse anesthetist because he was licensed as such, had administered anesthesia before, and had done so for dentists; he was aware of the standard of care. Grover v. Isom, 137 Idaho 770, 53 P.3d 821 (2002).

Expert Unqualified.

Expert witness physician's affidavits did not comply with this rule because they did not affirmatively show that he possessed the professional knowledge and expertise to testify to the hospital's standard of care as affidavits did not state he was trained as hospital administrator or experienced in hospital management. Dunlap ex rel. Dunlap v. Garner, 127 Idaho 599, 903 P.2d 1296 (1995).

Where doctor rendered an opinion on blood recycling system, but had no personal experience with that machine or any related equipment, where he testified about decisions made in intensive care, an area that comprised less than 1% of his 12 years of practice that ended over 18 years ago, and where finally, he was prepared to critique decisions made about removing a patient from a respirator despite his very limited personal experience, doctor had developed no "expertise" in the procedures he examined. He, therefore, could not qualify as an expert witness under this section. Hollingsworth v. United States, 928 F. Supp. 1023 (D. Idaho 1996).

Familiarity with Local Standards.

Summary judgment for the defendant was affirmed in a medical malpractice action, where deposition testimony of the plaintiff's expert failed to establish his familiarity with local standards of care. Frank v. East Shoshone Hosp., 114 Idaho 480, 757 P.2d 1199 (1988).

Where, in opposition to defendants' motions for summary judgment in a medical malpractice action, plaintiffs submitted two affidavits of physicians, both practicing outside the state, that the surgery should have been postponed and that it was a departure from optimal patient care to not postpone an elective surgery under such circumstances, neither affidavit demonstrated any knowledge of the applicable standard of care in the local community and they were wholly insufficient to satisfy the burden of plaintiffs at the summary judgment juncture. Dekker v. Magic Valley Regional Medical Ctr., 115 Idaho 332, 766 P.2d 1213 (1988).

An expert from outside the state must demonstrate that he possesses knowledge of the local community standard. If he is board-certified in the same specialty, he must, at a minimum, inquire of a local specialist to determine whether the local community standard varies from the national standard for that board-certified specialty. Strode v. Lenzi, 116 Idaho 214, 775 P.2d 106 (1989).

Expert's affidavit did not present sufficient facts admissible in evidence to demonstrate affirmatively that expert was familiar with the local standard of care; because the trial court found expert's affidavit was not admissible evidence under Idaho Civil Procedure Rule 65(e), the Supreme Court of Idaho did not reach the requirements imposed by this section. Rhodehouse v. Stutts, 125 Idaho 208, 868 P.2d 1224 (1994).

It is sufficient for the out-of-state expert to gain the requisite familiarity with the standards of the community by conferring with local authorized personnel and stating that the standard did not deviate from the national standard. Dunlap ex rel. Dunlap v. Garner, 127 Idaho 599, 903 P.2d 1296 (1995).

The sworn statements of expert witness physician taken as true were sufficient to qualify him to express an expert opinion relative to the local area standard of care that was applicable and whether it was or was not adhered to by treating physician for purposes of summary judgment Dunlap ex rel. Dunlap v. Garner, 127 Idaho 599, 903 P.2d 1296 (1995).

Even where no national standard applied, an out-of-area physician may satisfy the foundational criteria of this section by obtaining information about the local standard of practice through consultations with one or more qualified local physicians. Keyser v. Garner,

129 Idaho 112, 922 P.2d 409 (Ct. App. 1996).

In malpractice suit against optometrist, testimony of ophthalmologist was insufficient to comply with § 6-1012 and this section since ophthalmologist professed to have no knowledge of the community standard of care with respect to the practice of optometry. Evans v. Griswold, 129 Idaho 902, 935 P.2d 165 (1997).

Since an ophthalmologist is a medical practitioner of a different class than an optometrist, as an ophthalmologist is a physician and an optometrist is not, in a malpractice action in order for testimony of ophthalmologist to withstand summary judgment under § 6-1012 and this section he must testify that he is familiar with the optometry standard care applicable to the time period and locality in question. Evans v. Griswold, 129 Idaho 902, 935 P.2d 165 (1997).

This section requires that an expert must show that he actually holds the opinion offered, that it is held with a reasonable degree of medical certainty, and that he or she is not only an expert but has actual knowledge of the applicable community standards. Kolln v. Saint Luke's Reg'l Med. Ctr., 130 Idaho 323, 940 P.2d 1142 (1997).

This section required that an expert in a malpractice action must show that he actually held the opinion, that it was held with a reasonable degree of medical certainty, and that he was not only an expert but had actual knowledge of the applicable community standard. Grover v. Smith, 137 Idaho 247, 46 P.3d 1105 (2002).

Expert witness had to possess actual knowledge of the standard of care, but it is not required that such actual knowledge had in all cases to be obtained by explicitly asking a specialist in the relevant field to explain the local standard of care. Newberry v. Martens, 142 Idaho 284, 127 P.3d 187 (2005).

Summary judgment for physicians in a medical malpractice case was proper when a patient's survivor called an expert witness who was from outside of the state, but the survivor failed to establish if the expert was familiar with the standard of care for the community. Ramos v. Dixon, 144 Idaho 32, 156 P.3d 533 (2007).

The district court properly allowed two experts to testify as to what conduct they would characterize as reaching a level of negligence that they saw as reckless. This testimony was permissible because (1) the experts had acquainted themselves adequately with the community standard for health care providers, and (2) their opinions as to the level of negligence of specific actions of a health care provider were not conclusions that the average juror would be qualified to draw. Jones v. Crawforth, 147 Idaho 11, 205 P.3d 660 (2009).

Foundation.

Since this section requires an expert witness to possess professional knowledge and expertise coupled with actual knowledge of the applicable community standard, and because the phrase "coupled with" denotes a contemporaneous relationship, awareness of the standard must exist when the expert testimony is given; if contemporaneous awareness is not demonstrated, the expert's testimony is subject to being excluded or stricken at trial, and such evidence is not entitled to evidentiary weight in summary judgment proceedings. Kunz v. Miciak, 118 Idaho 130, 795 P.2d 24 (Ct. App. 1990).

Because there was no indication that expert inquired of a local doctor, and plaintiff did not state that the local standard of care was the same as the national standard, there was not sufficient foundation in expert's affidavit to show that expert had actual knowledge of the applicable community standard. Rhodehouse v. Stutts, 125 Idaho 208, 868 P.2d 1224 (1994).

This section requires that the expert have not only "knowledge," but also "expertise." When the two terms are read together with their common definitions in mind, they mean that an expert must possess a combination of learning and experience. Hollingsworth v. United States, 928 F. Supp. 1023 (D. Idaho 1996).

Indeterminable Standard.

Because defendant doctor was one of only six cardiovascular surgeons in the state of Idaho and all six of these cardiovascular surgeons practiced together in Boise as a professional association, the standard of health care practice in the community ordinarily served by hospital was indeterminable and no "similar Idaho communities" existed about which plaintiff could have presented evidence of the standard of practice for a cardiovascular surgeon performing patent ductus arteriosus surgery; therefore, § 6-1012 and this section did not provide a means of establishing the applicable standard of practice in this case and, in resolving whether out-of-state doctor qualified as an expert witness to testify on plaintiff's behalf, the court turned to decisions predating the enactment of § 6-1012 and this section. Hoene v. Barnes, 121 Idaho 752, 828 P.2d 315 (1992).

Instructions.

The wording "all competent evidence" is a legally sufficient instruction in a medical malpractice claim. Perry v. Magic Valley Reg'l Med. Ctr., 134 Idaho 46, 995 P.2d 816 (2000).

In a medical malpractice action, the trial court did not err in declining to give plaintiffs' proposed instruction on negligence per se because the instruction was an erroneous statement of law; the instruction that the trial court gave properly and adequately

stated the statutory requirements for proving negligence. Schmechel v. Dille, — Idaho —, 219 P.3d 1192 (2009).

Medical Texts.

Overlapping references by defendant-physician and by plaintiff's out-of-state medical expert, to a common medical text, did not necessarily demonstrate a complete alignment of views on the applicable community medical standard. Kunz v. Miciak, 118 Idaho 130, 795 P.2d 24 (Ct. App. 1990).

National Standard of Care.

In a medical malpractice action the argument that there is but one national standard of care for board-certified specialists and that any community standard is superfluous is not without merit, however, it flies in the face of this section and has been rejected by the Idaho Supreme Court. Kunz v. Miciak, 118 Idaho 130, 795 P.2d 24 (Ct. App. 1990).

A national standard of care is not automatically implicated simply because the federal government has created a general regulatory scheme for a given area of medicine; thus, in a medical malpractice action, the testimony of the plaintiffs' expert witness was properly excluded, where he failed to establish that he had actual knowledge of the applicable community standard of care. McDaniel v. Inland Northwest Renal Care Group-Idaho, L.L.C., 144 Idaho 219, 159 P.3d 856 (2007).

Nationally Board-Certified Specialists.

The legislature intended that nationally board-certified specialists can testify regarding the standard of care against other nationally board-certified specialists practicing in the same area of medicine; the residence of a board-certified physician should not be a basis for precluding his or her testimony. Buck v. St. Clair, 108 Idaho 743, 702 P.2d 781 (1985).

In order to meet the requirement of showing adequate familiarization under clause (c) of this section, a nationally board-certified specialist must demonstrate two elements: First, that he is board-certified in the same specialty as that of the defendant-physician; this demonstrates knowledge of the appropriate standard of care of board-certified physicians practicing in the specialty in question. Second, an out-of-the-area doctor must inquire of the local standard in order to insure there are no local deviations from the national standard under which the defendant-physician and witness-physician were trained. Buck v. St. Clair, 108 Idaho 743, 702 P.2d 781 (1985).

An out-of-state, board-certified orthopedic surgeon's naked assertion, that because he was familiar with the national standard of care he was also familiar with what was expected of an instate board-certified orthopedic surgeon, was totally insufficient to render him competent to testify concerning the applicable standard of care in a medical malpractice suit against an instate surgeon. Strode v. Lenzi, 116 Idaho 214, 775 P.2d 106 (1989).

Non-Certified Physician.

In a medical malpractice action against a board-certified pediatrician and a board-certified surgeon, the affidavit of a doctor who was not board-certified in either pediatrics or surgery was sufficient to raise a genuine issue of material fact and to defeat the motion for summary judgment of the defendants where he demonstrated that he was judging the defendants in comparison with similarly trained and qualified physicians in the same community, taking into account their training, experience, and fields of medical specialization, he was a knowledgeable, competent expert witness, he actually held an opinion about the applicable standard of practice and the failure of the defendants to meet the standard, his opinion was rendered with reasonable medical certainty, and he possessed professional knowledge and expertise coupled with actual knowledge of the applicable community standard to which his expert opinion testimony was addressed. Pearson v. Parsons, 114 Idaho 334, 757 P.2d 197 (1988).

Standard of Care.

Physician treating a patient in a nursing facility is not free to adopt a standard of care lower than that required of the nursing home in which the provider works. If the physician is functioning both as treating physician and as medical director of the facility, his standard of care includes the minimum standards set by applicable state and federal law. Hayward v. Jack's Pharm., Inc., 141 Idaho 622, 115 P.3d 713 (2005).

Statements by Defendant Doctor.

Where defendant doctor stated to plaintiff's husband that he had "obviously messed up" laparoscopic tubal ligation surgical procedure and did not bill plaintiff for additional surgery to correct hole burned in plaintiff's small intestine, this was not sufficient evidence that defendant failed to meet the applicable standard of health care practice in the community under § 6-1012 and this section. Maxwell v. Women's Clinic P.A., 102 Idaho 53, 625 P.2d 407 (1981).

Stricken Testimony.

The district court erred by striking plaintiff's expert's testimony that the local standard of care was violated when doctor failed to determine that fetus was a macrosomic baby which could have been accomplished by the use of ultrasound or biophysical testing. Kozlowski v. Rush, 121 Idaho 825, 828 P.2d 854 (1992).

Summary Judgment.

In support of the motion for summary judgment in a medical malpractice action, the affidavits of the expert witnesses offered in support of the motion for summary judgment were devoid of statements indicating actual knowledge of the standard of practice in the community; therefore, the burden never shifted to the plaintiffs to show that there was a genuine issue for trial. Pearson v. Parsons, 114 Idaho 334, 757 P.2d 197 (1988).

In granting summary judgment in favor of dentist in an action by patient for medical malpractice, trial court erred in rejecting affidavit of patient's expert witness, which stated the witness had familiarized himself with the local community standard of care and which provided a factual background to support his familiarization; trial court erroneously involved itself in weighing conflicting evidence rather than in determining whether, for purposes of surviving summary judgment, the affidavit had offered sufficient evidence. Watts v. Lynn, 125 Idaho 341, 870 P.2d 1300 (1994).

District court erred by striking the patient's experts' affidavits and granting summary judgment to the physician; because one expert's significant amount of experience demonstrated the requisite personal knowledge of the relevant standard of care in the area at the time of the patient's surgery, his affidavit was admissible, and the other expert's fourth affidavit was admissible, as it satisfied the requirement that an out-of-area expert obtain knowledge of the local standard of care by consulting with a doctor familiar with the local standard of care. Shane v. Blair, 139 Idaho 126, 75 P.3d 180 (2003).

Cited in: Grimes v. Green, 113 Idaho 519, 746 P.2d 978 (1987); Rook v. Trout, 113 Idaho 652, 747 P.2d 61 (1987); Bolen v. United States, 727 F. Supp. 1346 (D. Idaho 1989); Litz v. Robinson, 131 Idaho 282, 955 P.2d 113 (Ct. App. 1997); Shannahan v. Gigray, 131 Idaho 664, 962 P.2d 1048 (1998); Mains v. Cach, 143 Idaho 221, 141 P.3d 1090 (2006).

RESEARCH REFERENCES

Am. Jur. — 61 Am. Jur. 2d, Physicians, Surgeons and Other Healers, §§ 328, 329.

A.L.R. — Competency of general practitioner to testify as expert witness in action against specialist for medical malpractice. 31 A.L.R.3d 1163.

Locality rule as governing hospital's standard of care to patient and expert's competency to testify thereto. 36 A.L.R.3d 440.

Competency of physician or surgeon from one locality to testify, in malpractice case, as to standard of care required of defendant practicing in another locality. 37 A.L.R.3d 420.

CHAPTER 11

RESPONSIBILITIES AND LIABILITIES OF SKIERS AND SKI AREA OPERATORS

SECTION.

6-1101. Legislative purpose. — The legislature finds that the sport of skiing is practiced by a large number of citizens of this state and also attracts a large number of nonresidents, significantly contributing to the economy of Idaho. Since it is recognized that there are inherent risks in the sport of skiing which should be understood by each skier and which are essentially impossible to eliminate by the ski area operation, it is the purpose of this chapter to define those areas of responsibility and affirmative acts for which ski area operators shall be liable for loss, damage or injury, and to define those risks which the skier expressly assumes and for

which there can be no recovery.

History.
I.C., § 6-1101, as added by 1979, ch. 270, § 1, p. 701.

JUDICIAL DECISIONS

ANALYSIS

Constitutionality.
Legislative intent.
Purpose.
Nature of immunity.

Constitutionality.
When the legislature stated the legislative purpose of this chapter, it included the statement that "the sport of skiing is practiced by a large number of citizens of this state and also attracts a large number of nonresidents, significantly contributing to the economy of Idaho," and since this was a legitimate legislative goal and satisfies the rational basis test, this chapter does not violate the equal protection clause of the constitution. Northcutt v. Sun Valley Co., 117 Idaho 351, 787 P.2d 1159 (1990).

Legislative Intent.
In enacting this chapter, the legislature intended to limit rather than expand the liability of ski area operators. Northcutt v. Sun Valley Co., 117 Idaho 351, 787 P.2d 1159 (1990).

Purpose.
The government of Idaho clearly has a legitimate interest in promoting the sport of skiing, because the sport "significantly contribut[es] to the economy of Idaho." This chapter bears a rational relationship to this interest because it clarifies the allocation of risks and responsibilities between ski area operators and skiers. Collins v. Schweitzer, Inc., 21 F.3d 1491 (9th Cir.), cert. denied, 513 U.S. 962, 115 S. Ct. 422, 130 L. Ed. 2d 337 (1994).

Nature of Immunity.
This chapter immunizes ski area operators only from liability arising from risks inherent in the sport of skiing. Northcutt v. Sun Valley Co., 117 Idaho 351, 787 P.2d 1159 (1990).

Cited in: Kirkland ex rel. Kirkland v. Blain County Med. Ctr., 134 Idaho 464, 4 P.3d 1115 (2000).

6-1102. Definitions. — The following words and phrases when used in this chapter shall have, unless the context clearly indicates otherwise, the meanings given to them in this section.

(1) "Aerial passenger tramway" means any device operated by a ski area operator used to transport passengers, by single or double reversible tramway; chair lift or gondola lift; T-bar lift, J-bar lift, platter lift or similar device; or a fiber rope tow, which is subject to regulations adopted by the proper authority.

(2) "Passenger" means any person who is lawfully using an aerial passenger tramway, or is waiting to embark or has recently disembarked from an aerial passenger tramway and is in its immediate vicinity.

(3) "Ski area" means the property owned or leased and under the control of the ski area operator within the state of Idaho.

(4) "Ski area operator" means any person, partnership, corporation or other commercial entity and their agents, officers, employees or representatives, who has operational responsibility for any ski area or aerial passenger tramway.

(5) "Skiing area" means all designated slopes and trails but excludes any aerial passenger tramway.

(6) "Skier" means any person present at a skiing area under the control of a ski area operator for the purpose of engaging in the sport of skiing by utilizing the ski slopes and trails and does not include the use of an aerial passenger tramway.

(7) "Ski slopes and trails" mean those areas designated by the ski area operator to be used by skiers for the purpose of participating in the sport of skiing.

History.
I.C., § 6-1102, as added by 1979, ch. 270, § 1, p. 701.

6-1103. Duties of ski area operators with respect to ski areas. — Every ski area operator shall have the following duties with respect to their operation of a skiing area:

(1) To mark all trail maintenance vehicles and to furnish such vehicles with flashing or rotating lights which shall be in operation whenever the vehicles are working or are in movement in the skiing area;

(2) To mark with a visible sign or other warning implement the location of any hydrant or similar equipment used in snowmaking operations and located on ski slopes and trails;

(3) To mark conspicuously the top or entrance to each slope or trail or area, with an appropriate symbol for its relative degree of difficulty; and those slopes, trails, or areas which are closed, shall be so marked at the top or entrance;

(4) To maintain one or more trail boards at prominent locations at each ski area displaying that area's network of ski trails and slopes with each trail and slope rated thereon as to it [its] relative degree of difficulty;

(5) To designate by trail board or otherwise which trails or slopes are open or closed;

(6) To place, or cause to be placed, whenever snowgrooming or snowmaking operations are being undertaken upon any trail or slope while such trail or slope is open to the public, a conspicuous notice to that effect at or near the top of such trail or slope;

(7) To post notice of the requirements of this chapter concerning the use of ski retention devices. This obligation shall be the sole requirement imposed upon the ski area operator regarding the requirement for or use of ski retention devices;

(8) To provide a ski patrol with qualifications meeting the standards of the national ski patrol system;

(9) To post a sign at the bottom of all aerial passenger tramways which advises the passengers to seek advice if not familiar with riding the aerial passenger tramway; and

(10) Not to intentionally or negligently cause injury to any person; provided, that except for the duties of the operator set forth in subsections (1) through (9) of this section and in section 6-1104, Idaho Code, the operator shall have no duty to eliminate, alter, control or lessen the risks inherent in the sport of skiing, which risks include but are not limited to those described in section 6-1106, Idaho Code; and, that no activities undertaken by the

operator in an attempt to eliminate, alter, control or lessen such risks shall be deemed to impose on the operator any duty to accomplish such activities to any standard of care.

History.
I.C., § 6-1103, as added by 1979, ch. 270, § 1, p. 701.

STATUTORY NOTES

Compiler's Notes.
The national ski patrol provides training and education programs for emergency rescuers serving the outdoor recreation community. See *http://www.nsp.org*.

The bracketed word "its" in subsection (4) was inserted by the compiler.

JUDICIAL DECISIONS

Analysis

Ignoring area's instructions.
Improper placement of signs.
Inherent risk.
Ski races.
Ski towers.
Standard of care.
Unmarked area.

Ignoring Area's Instructions.
When a skier ignores the ski area's instructions to ski only on designated trails and embarks on an enterprise too difficult for someone of his ability, the ski area is not liable for his mishaps. Long v. Bogus Basin Recreational Ass'n, 125 Idaho 230, 869 P.2d 230 (1994).

Improper Placement of Signs.
Under this chapter, a ski area operator is not liable for the improper placement of a sign erected to eliminate, alter, control or lessen the inherent risks in skiing or for the improper design, construction or padding of a signpost that supported the sign. Northcutt v. Sun Valley Co., 117 Idaho 351, 787 P.2d 1159 (1990).

Inherent Risk.
In personal injury action by skier injured when she tripped over a rope intended to guide people away from the exit ramp of a chair lift, summary judgment was properly granted to ski resort, as the rope was intended to eliminate, alter, control, or lessen the inherent risk of skiing. The accident was not caused by the construction, operation, maintenance or repair of the chairlift. Withers v. Bogus Basin Rec. Ass'n, 144 Idaho 78, 156 P.3d 579 (2007).

Ski Races.
Setting up a NASTAR race course is a normal part of running a ski area, and thus, anything a ski area does to eliminate or lessen the inherent risks of skiing in connection with setting up the race course or protecting skiers from hazardous obstacles cannot be the basis of liability for negligence. Collins v. Schweitzer, Inc., 774 F. Supp. 1253 (D. Idaho 1991), aff'd, 21 F.3d 1491 (9th Cir.), cert. denied, 513 U.S. 962, 115 S. Ct. 422, 130 L. Ed. 2d 337 (1994).

Ski Towers.
Under § 6-1106, anyone who strikes a ski lift tower while skiing is considered to have expressly assumed the risk and legal responsibility for any injury which results, and in addition, under subsection (10) of this section, anything a ski area operator does to eliminate, alter, control or lessen the risks associated with lift towers — such as placing a fence around a tower or padding it — could not result in the operator being held liable for negligence. Collins v. Schweitzer, Inc., 774 F. Supp. 1253 (D. Idaho 1991), aff'd, 21 F.3d 1491 (9th Cir.), cert. denied, 513 U.S. 962, 115 S. Ct. 422, 130 L. Ed. 2d 337 (1994).

Ski area operator owed amateur race skier no duty to reduce the risk of his striking and injuring himself on a lift tower. Collins v. Schweitzer, Inc., 21 F.3d 1491 (9th Cir.), cert. denied, 513 U.S. 962, 115 S. Ct. 422, 130 L. Ed. 2d 337 (1994).

Standard of Care.
If a ski area operator has no duty to accomplish any activity undertaken in an attempt to eliminate, alter, control or lessen the inherent risks of skiing and if the duties described

in this section and § 6-1104 are the only duties an operator has with regard to the inherent risks of skiing, then it necessarily follows that any activity of an operator to fulfill those duties may not be held to be negligence, since the operator had no duty to accomplish the activity to any standard of care. Northcutt v. Sun Valley Co., 117 Idaho 351, 787 P.2d 1159 (1990).

A ski area operator's duty not to negligently cause injury refers to the failure to follow (1) any of the duties set forth in this section and § 6-1104 or (2) any duty that does not relate to eliminating, altering, controlling or lessening the inherent risks of skiing. Northcutt v. Sun Valley Co., 117 Idaho 351, 787 P.2d 1159 (1990).

While one of the duties imposed on ski area operators by this section is to mark conspicuously the top or entrance to each slope or trail or area, with an appropriate symbol for its relative degree of difficulty, even assuming that a ski area operator may not have properly located a sign or properly designed, constructed or padded the signpost, this chapter excludes any liability of ski area operator to the plaintiffs as a result of these activities; while subdivision (3) of this section did require ski area operator to mark the entrance to each of its slopes, trails or areas, subsection (10) of this section negates any duty to accomplish this marking to any standard of care. Northcutt v. Sun Valley Co., 117 Idaho 351, 787 P.2d 1159 (1990).

The duties described in this section and § 6-1104 are the only duties a ski area operator has with respect to the inherent risks of skiing and even anything an operator does to fulfill those duties cannot be held to be negligence because the operator had no duty to accomplish the activity to any standard of care, and in addition, anything else a ski area operator does to attempt to lessen the inherent risks of skiing cannot result in liability for negligence for that action. Collins v. Schweitzer, Inc., 774 F. Supp. 1253 (D. Idaho 1991), aff'd, 21 F.3d 1491 (9th Cir.), cert. denied, 513 U.S. 962, 115 S. Ct. 422, 130 L. Ed. 2d 337 (1994).

In conducting training sessions, the defendant foundation did not have the responsibility to fulfill the duties under this section; the mere fact that the defendant foundation set up the course within the ski area did not make them a "ski operator." By setting up the course the defendant foundation was not engaged in any duties or activities of a "ski area operator." By making use of the ski area for training, defendant foundation did not exercise "operational responsibility" for the ski area, and the court correctly denied defendant's summary judgment on that basis. Davis v. Sun Valley Ski Educ. Found., Inc., 130 Idaho 400, 941 P.2d 1301 (1997).

A ski area operator does not have the duty to provide a ski patrol that will determine the identity of a skier who was involved in a ski accident with another skier. Northcutt v. Sun Valley Co., 117 Idaho 351, 787 P.2d 1159 (1990).

Unmarked Area.

An injury to the body caused by falling while skiing in an unmarked, ungroomed area is an inherent risk of skiing and a ski resort had no duty to take some kind of affirmative steps to have prevented skier from being injured. Long v. Bogus Basin Recreational Ass'n, 125 Idaho 230, 869 P.2d 230 (1994).

6-1104. Duties of ski area operators with respect to aerial passenger tramways. — Every ski area operator shall have the duty to construct, operate, maintain and repair any aerial passenger tramway in accordance with the American national standards safety requirements for aerial passenger tramways.

History.

I.C., § 6-1104, as added by 1979, ch. 270, § 1, p. 701.

STATUTORY NOTES

Compiler's Notes.

The American national standards institute's current publication covering tramway safety is ANSI B77.1-2006, "Passenger Ropeway & Aerial Tramways, Aerial Lifts, Surface Lifts, Tows and Conveyors — Safety Requirement."

JUDICIAL DECISIONS

ANALYSIS

Inherent risk.
Standard of care.

Inherent Risk.

In personal injury action by skier injured when she tripped over a rope intended to guide people away from the exit ramp of a chair lift, summary judgment was properly granted to ski resort, as the rope was intended to eliminate, alter, control, or lessen the inherent risk of skiing. The accident was not caused by the construction, operation, maintenance or repair of the chairlift. Withers v. Bogus Basin Rec. Ass'n, 144 Idaho 78, 156 P.3d 579 (2007).

Standard of Care.

If a ski area operator has no duty to accomplish any activity undertaken in an attempt to eliminate, alter, control or lessen the inherent risks of skiing and if the duties described in § 6-1103 and this section are the only duties an operator has with regard to the inherent risks of skiing, then it necessarily follows that any activity of an operator to fulfill those duties may not be held to be negligence, since the operator had no duty to accomplish the activity to any standard of care. Northcutt v. Sun Valley Co., 117 Idaho 351, 787 P.2d 1159 (1990).

A ski area operator's duty not to negligently cause injury refers to the failure to follow (1) any of the duties set forth in § 6-1103 and this section or (2) any duty that does not relate to eliminating, altering, controlling or lessening the inherent risks of skiing. Northcutt v. Sun Valley Co., 117 Idaho 351, 787 P.2d 1159 (1990).

The duties described in § 6-1103 and this section are the only duties a ski area operator has with respect to the inherent risks of skiing and even anything an operator does to fulfill those duties cannot be held to be negligence because the operator had no duty to accomplish the activity to any standard of care; in addition, anything else a ski area operator does to attempt to lessen the inherent risks of skiing cannot result in liability for negligence for that action. Collins v. Schweitzer, Inc., 774 F. Supp. 1253 (D. Idaho 1991), aff'd, 21 F.3d 1491 (9th Cir.), cert. denied, 513 U.S. 962, 115 S. Ct. 422, 130 L. Ed. 2d 337 (1994).

6-1105. Duties of passengers. — Every passenger shall have the duty not to:

(1) Board or embark upon or disembark from an aerial passenger tramway except at an area designated for such purpose;

(2) Drop, throw or expel any object from an aerial passenger tramway;

(3) Do any act which shall interfere with the running or operation of an aerial passenger tramway;

(4) Use any aerial passenger tramway if the passenger does not have the ability to use it safely without instruction until the passenger has requested and received sufficient instruction to permit safe usage;

(5) Embark on an aerial passenger tramway without the authority of the ski area operator;

(6) Use any aerial passenger tramway without engaging such safety or restraining devices as may be provided.

History.

I.C., § 6-1105, as added by 1979, ch. 270, § 1, p. 701.

6-1106. Duties of skiers. — It is recognized that skiing as a recreational sport is hazardous to skiers, regardless of all feasible safety measures which can be taken.

Each skier expressly assumes the risk of and legal responsibility for any injury to person or property which results from participation in the sport of

skiing including any injury caused by the following, all whether above or below snow surface: variations in terrain; surface or subsurface snow or ice conditions; bare spots, rocks, trees, other forms of forest growth or debris, lift towers and components thereof; utility poles, and snowmaking and snowgrooming equipment which is plainly visible or plainly marked in accordance with the provisions of section 6-1103, Idaho Code. Therefore, each skier shall have the sole individual responsibility for knowing the range of his own ability to negotiate any slope or trail, and it shall be the duty of each skier to ski within the limits of the skier's own ability, to maintain reasonable control of speed and course at all times while skiing, to heed all posted warnings, to ski only on a skiing area designated by the ski area operator and to refrain from acting in a manner which may cause or contribute to the injury of anyone. The responsibility for collisions by any skier while actually skiing, with any person, shall be solely that of the individual or individuals involved in such collision and not that of the ski area operator.

No person shall place any object in the skiing area or on the uphill track of any aerial passenger tramway which may cause a passenger or skier to fall; cross the track of any T-bar lift, J-bar lift, platter lift or similar device, or a fiber rope tow, except at a designated location; or depart when involved in a skiing accident, from the scene of the accident without leaving personal identification, including name and address, before notifying the proper authorities or obtaining assistance when that person knows that any other person involved in the accident is in need of medical or other assistance.

No skier shall fail to wear retention straps or other devices to help prevent runaway skis.

History.
I.C., § 6-1106, as added by 1979, ch. 270, § 1, p. 701.

JUDICIAL DECISIONS

Analysis

Ignoring area's instructions.
Inherent risks.
Legislative intent.
Liability.
Lift towers.

Ignoring Area's Instructions.

When a skier ignores the ski area's instructions to ski only on designated trails and embarks on an enterprise too difficult for someone of his ability, the ski area is not liable for his mishaps. Long v. Bogus Basin Recreational Ass'n, 125 Idaho 230, 869 P.2d 230 (1994).

Inherent Risks.

This chapter immunizes ski area operators only from liability arising from risks inherent in the sport of skiing. Northcutt v. Sun Valley Co., 117 Idaho 351, 787 P.2d 1159 (1990).

Under this section, anyone who strikes a ski lift tower while skiing is considered to have expressly assumed the risk and legal responsibility for any injury which results; in addition, under § 6-1103(10), anything a ski area operator does to eliminate, alter, control or lessen the risks associated with lift towers — such as placing a fence around a tower or padding it — could not result in the operator being held liable for negligence. Collins v. Schweitzer, Inc., 774 F. Supp. 1253 (D. Idaho 1991), aff'd, 21 F.3d 1491 (9th Cir.), cert. denied, 513 U.S. 962, 115 S. Ct. 422, 130 L. Ed. 2d 337 (1994).

Legislative Intent.

In enacting this chapter the legislature intended to limit rather than expand the liability of ski area operators. Northcutt v. Sun Valley Co., 117 Idaho 351, 787 P.2d 1159 (1990).

This section does not distinguish between injuries suffered during racing and injuries suffered during other types of skiing, and there is no legislative history to indicate that the Idaho legislature intended such a distinction. Collins v. Schweitzer, Inc., 21 F.3d 1491 (9th Cir.), cert. denied, 513 U.S. 962, 115 S. Ct. 422, 130 L. Ed. 2d 337 (1994).

Liability.

The assumption of risks contained in this section apply only to any liability of a ski area operator, and the defendant's contention that, regardless of whether they fell within the definition of a ski area operator, the plaintiff expressly assumed the risk of the injuries she sustained was erroneous. Davis v. Sun Valley Ski Educ. Found., Inc., 130 Idaho 400, 941 P.2d 1301 (1997).

Lift Towers.

According to the plain language of this section, skier expressly assumed the risk of injury resulting from striking a lift tower and, therefore, could not recover from ski area operator for his injury. Collins v. Schweitzer, Inc., 21 F.3d 1491 (9th Cir.), cert. denied, 513 U.S. 962, 115 S. Ct. 422, 130 L. Ed. 2d 337 (1994).

RESEARCH REFERENCES

A.L.R. — Skier's liability for injuries to or death of another person. 75 A.L.R.5th 583.

6-1107. Liability of ski area operators. — Any ski area operator shall be liable for loss or damages caused by its failure to follow the duties set forth in sections 6-1103 and 6-1104, Idaho Code, where the violation of duty is causally related to the loss or damage suffered. The ski area operators shall not be liable to any passenger or skier acting in violation of their duties as set forth in sections 6-1105 and 6-1106, Idaho Code, where the violation of duty is causally related to the loss or damage suffered; nor shall a ski area operator be liable for any injury or damage to a person who is not legally entitled to be in the ski area; or for any loss or damages caused by any object dropped, thrown or expelled by a passenger from an aerial passenger tramway.

History.

I.C., § 6-1107, as added by 1979, ch. 270, § 1, p. 701.

JUDICIAL DECISIONS

Analysis

Ignoring Area's Instructions.

When a skier ignores the ski area's instructions to ski only on designated trails and embarks on an enterprise too difficult for someone of his ability, the ski area is not liable for his mishaps. Long v. Bogus Basin Recreational Ass'n, 125 Idaho 230, 869 P.2d 230 (1994).

Inherent Risks.

This chapter immunizes ski area operators only from liability arising from risks inherent in the sport of skiing. Northcutt v. Sun Valley Co., 117 Idaho 351, 787 P.2d 1159 (1990).

Legislative Intent.

In enacting this chapter, the legislature

intended to limit rather than expand the liability of ski area operators. Northcutt v. Sun Valley Co., 117 Idaho 351, 787 P.2d 1159 (1990).

Standard of Care.

If a ski area operator has no duty to accomplish any activity undertaken in an attempt to eliminate, alter, control or lessen the inherent risks of skiing and if the duties described in §§ 6-1103 and 6-1104 are the only duties an operator has with regard to the inherent risks of skiing, then it necessarily follows that any activity of an operator to fulfill those duties may not be held to be negligence, since the operator had no duty to accomplish the activity to any standard of care. Northcutt v. Sun Valley Co., 117 Idaho 351, 787 P.2d 1159 (1990).

Unmarked Area.

An injury to the body caused by falling while skiing in an unmarked, ungroomed area is an inherent risk of skiing and a ski resort had no duty to take some kind of affirmative steps to have prevented skier from being injured. Long v. Bogus Basin Recreational Ass'n, 125 Idaho 230, 869 P.2d 230 (1994).

6-1108. Liability of passengers. — Any passenger shall be liable for loss or damages resulting from violations of the duties set forth in section 6-1105, Idaho Code, and shall not be able to recover from the ski area operator for any losses or damages where the violation of duty is causally related to the loss or damage suffered.

History.

I.C., § 6-1108, as added by 1979, ch. 270, § 1, p. 701.

6-1109. Liability of skiers. — Any skier shall be liable for loss or damages resulting from violations of the duties set forth in section 6-1106, Idaho Code, and shall not be able to recover from the ski area operator for any losses or damages where the violation of duty is causally related to the loss or damage suffered.

History.

I.C., § 6-1109, as added by 1979, ch. 270, § 1, p. 701.

RESEARCH REFERENCES

A.L.R. — Skier's liability for injuries to or death of another person. 75 A.L.R.5th 583.

CHAPTER 12

RESPONSIBILITIES AND LIABILITIES OF RECREATIONAL PARTICIPANTS AND OUTFITTERS AND GUIDES

6-1201. Legislative purpose. — Every year, in rapidly increasing numbers, the inhabitants of the state of Idaho and nonresidents are enjoying the recreational value of Idaho's mountains, rivers, and streams, many of which are remote and far removed for ordinary auto travel. The tourist trade is of

vital importance to the state of Idaho, and the services offered by licensed outfitters and guides significantly contribute to the economy of the state of Idaho. The legislature recognizes that there are inherent risks in the recreational activities provided by outfitters which should be understood by each participant. These risks are essentially impossible to eliminate by outfitters and guides. It is the purpose of this chapter to define those areas of responsibility and affirmative acts for which outfitters and guides shall be liable for loss, damage, or injury, and to define those risks which the participant expressly assumes and for which there can be no recovery.

History.
I.C., § 6-1201, as added by 1979, ch. 317, § 1, p. 851.

JUDICIAL DECISIONS

Public Duty.
Where the legislature has addressed the rights and duties pertaining to personal injuries arising out of the relationship between two groups, i.e., employers/employees, outfitters and guides/participants, and has granted limited liability to one group in exchange for adherence to specific duties, then such duties become a "public duty" within the exception to the general rule validating exculpatory contracts. Lee v. Sun Valley Co., 107 Idaho 976, 695 P.2d 361 (1984).

6-1202. Definitions. — (a) "Outfitter" shall include any individual, firm, partnership, corporation, or other organization or any combination thereof as defined in section 36-2102(b), Idaho Code.

(b) "Guide" shall include any person defined in section 36-2102(c), Idaho Code.

(c) "Participant" shall include any person using the services of an outfitter or guide licensed under chapter 21, title 36, Idaho Code.

History.
I.C., § 6-1202, as added by 1979, ch. 317, § 1, p. 851.

6-1203. Duties of an outfitter. — All outfitters offering professional services in this state shall provide facilities, equipment, and services as advertised or as agreed upon between the outfitter and the participant. All services, facilities, and equipment provided by outfitters in this state shall conform to safety and other requirements set forth in chapter 21, title 36, Idaho Code, and by the rules promulgated by the Idaho outfitters and guides board created by chapter 21, title 36, Idaho Code.

History.
I.C., § 6-1203, as added by 1979, ch. 317, § 1, p. 851; am. 1997, ch. 345, § 1, p. 1028.

6-1204. Duties of a guide. — Any guide providing personal services for an outfitter in this state shall conform to the standard of care expected of members of his profession and he shall comply with all duties and requirements placed on him by chapter 21, title 36, Idaho Code, and by the rules promulgated by the Idaho outfitters and guides [licensing] board created by

chapter 21, title 36, Idaho Code.

History.
I.C., § 6-1204, as added by 1979, ch. 317, § 1, p. 851; am. 1997, ch. 345, § 2, p. 1028.

STATUTORY NOTES

Cross References.
Idaho outfitters and guides licensing board, § 36-2105.

Compiler's Notes.
The bracketed insertion was added by the compiler to correct the agency reference.

JUDICIAL DECISIONS

Public Duty.
Where the legislature has addressed the rights and duties pertaining to personal injuries arising out of the relationship between two groups, i.e., employers/employees, outfitters and guides/participants, and has granted limited liability to one group in exchange for adherence to specific duties, then such duties become a "public duty" within the exception to the general rule validating exculpatory contracts. Lee v. Sun Valley Co., 107 Idaho 976, 695 P.2d 361 (1984).

Cited in: Collins v. Schweitzer, Inc., 774 F. Supp. 1253 (D. Idaho 1991).

6-1205. Duties of participants. — It is recognized that some recreational activities conducted by outfitters and guides are hazardous to participants regardless of all feasible safety measures which can be taken. Participants shall have a duty to act as would a reasonably prudent man when engaging in recreational activities offered by licensed outfitters and guides in this state. Participants shall have a duty not to:

(a) Do any act which shall interfere with the running or operation of an outfitter's or guide's activities, when such activities conform to the rules of the Idaho outfitters and guides [licensing] board and to the requirements of chapter 21, title 36, Idaho Code;

(b) Use any outfitter's or guide's equipment or facilities or services if the participant does not have the ability to use such facilities or equipment or services safely without instructions until the participant has requested and received sufficient instruction to permit safe usage;

(c) Engage in any harmful conduct, or willfully or negligently engage in any type of conduct which contributes to or causes injury to any person;

(d) Embark on any self-initiated activity without first informing the outfitter or guide of his intentions and receiving permission from the outfitter or guide to engage in such self-initiated activity.

History.
I.C., § 6-1205, as added by 1979, ch. 317, § 1, p. 851; am. 1997, ch. 345, § 3, p. 1028.

STATUTORY NOTES

Cross References.
Idaho outfitters and guides licensing board, § 36-2105.

Compiler's Notes.
The bracketed insertion in subsection (a) was added by the compiler to correct the agency reference.

6-1206. Liability of outfitters and guides. — (a) No licensed outfitter or guide acting in the course of his employment shall be liable to a participant for damages or injuries to such participant unless such damage or injury was directly or proximately caused by failure of the outfitter or guide to comply with the duties placed on him by chapter 21, title 36, Idaho Code, or by the rules of the Idaho outfitters and guides [licensing] board, or by the duties placed on such outfitter or guide by the provisions of this chapter.

(b) The limitations on liability created by this chapter shall apply only to outfitters or guides appropriately licensed under the provisions of chapter 21, title 36, Idaho Code, and only when the outfitter or guide is acting within the course of his employment. In the event that there is damage or injury to a participant by the action of an outfitter or guide, and there is no exemption for liability for such outfitter or guide under the provisions of this act, the rules of negligence and comparative negligence existing in the laws of the state of Idaho shall apply.

History.
I.C., § 6-1206, as added by 1979, ch. 317, § 1, p. 851; am. 1997, ch. 345, § 4, p. 1028.

STATUTORY NOTES

Cross References.
Idaho outfitters and guides licensing board, § 36-2105.

Compiler's Notes.
The bracketed insertion in subsection (a) was added by the compiler to correct the agency reference.

The words "this act" refer to S.L. 1979, ch. 317 compiled as §§ 6-1201 to 6-1206.

JUDICIAL DECISIONS

Analysis

Participant.
Public duty.
Service.

Participant.
A passenger on a snowmachine could not be characterized as a "participant" since she did not receive "services" from the defendant. Hanks v. Sawtelle Rentals, Inc., 133 Idaho 199, 984 P.2d 122 (1999).

Public Duty.
Where the legislature has addressed the rights and duties pertaining to personal injuries arising out of the relationship between two groups, i.e., employers/employees, outfitters and guides/participants, and has granted limited liability to one group in exchange for adherence to specific duties, then such duties become a "public duty" within the exception to the general rule validating exculpatory contracts. Lee v. Sun Valley Co., 107 Idaho 976, 695 P.2d 361 (1984).

Service.
Because renting clothing and helmets to the plaintiffs was merely incidental to the defendant's leasing of equipment, and because the defendant's decision to retrieve a disabled snowmachine could not be said to be a service to the plaintiffs, this section did not operate to limit the defendant's liability. Hanks v. Sawtelle Rentals, Inc., 133 Idaho 199, 984 P.2d 122 (1999).

CHAPTER 13

RESPONSIBILITIES FOR DONORS AND GLEANERS OF FOOD

SECTION.

6-1301. Definitions. — As used in this chapter:

(1) "Donor" includes, but is not limited to, any food establishment, farmer, processor, distributor, wholesaler or retailer of perishable or nonperishable food.

(2) "Gleaner" means a person who harvests for free distribution perishable food that has been donated by the owner.

(3) "Perishable food" means any food that may spoil or otherwise become unfit for human consumption because of its nature, type or physical condition. "Perishable food" includes, but is not limited to, fresh or processed meats, poultry, seafood, dairy products, bakery products, eggs in the shell, fresh fruits or vegetables, foods that have been packaged, refrigerated or frozen and unserved food of any kind which has been prepared by or for a food establishment. "Perishable food" does not include foods that have been canned and which remain in a sealed canning container.

History.
I.C., § 6-1301, as added by 1980, ch. 93, § 1, p. 203; am. 1995, ch. 85, § 1, p. 249.

STATUTORY NOTES

Compiler's Notes.
Chapters 93 and 225 of S.L. 1980 each purported to enact a new chapter 13 in title 6. Accordingly, chapter 93 was codified as title 6, chapter 13 (§§ 6-1301, 6-1302) while chapter 225 was codified as title 6, chapter 14 through the use of brackets. The redesignation of the sections enacted by S.L. 1980, ch. 225 was made permanent by S.L. 2005, ch. 25.

6-1302. Donors and gleaners exempt from liability. — Notwithstanding any other provision of law, the good faith donor of any perishable or nonperishable food, apparently fit for human consumption, to a bona fide charitable or nonprofit organization for free distribution, or a gleaner of any perishable food apparently fit for human consumption, shall not be subject to criminal penalty or civil damages arising from the condition of the food, unless an injury is caused by the gross negligence, recklessness or intentional misconduct of the donor or gleaner.

Nothing in this section is intended to limit any liability on the part of a donee charitable or nonprofit organization accepting perishable food items.

This section includes the good faith donation of perishable or nonperishable food not readily marketable due to appearance, freshness, grade, surplus or other consideration, but does not restrict the authority of any appropriate agency to regulate or ban the use of such food for human consumption.

History.
I.C., § 6-1302, as added by 1980, ch. 93, § 1, p. 203.

STATUTORY NOTES

Cross References.
Immunity of food donor and food bank, § 5-339.

CHAPTER 14
PRODUCT LIABILITY

6-1401. Scope. — The previous existing applicable law of this state on product liability is modified only to the extent set forth in this act.

History.
I.C., § 6-1301, as added by 1980, ch. 225, § 1, p. 499; am. and redesig. 2005, ch. 25, § 3, p. 82.

STATUTORY NOTES

Compiler's Notes.
Chapters 93 and 225 of S.L. 1980 each purported to enact a new chapter 13 in title 6. Accordingly, chapter 93 was codified as title 6, chapter 13 (§§ 6-1301, 6-1302) while chapter 225 was codified as title 6, chapter 14 through the use of brackets. The redesignation of the sections enacted by S.L. 1980, ch. 225 was made permanent by S.L. 2005, ch. 25.

The words "this act" refer to S.L. 1980, ch. 225 compiled as §§ 6-1401 to 6-1409.

JUDICIAL DECISIONS

ANALYSIS

Comparative negligence.
Sellers of used products.
Survival of actions.

Comparative Negligence.
Nothing in this chapter modifies the approved and required practice of comparing the responsibility of all alleged tortfeasors on a special verdict form, whether or not those alleged tortfeasors are parties to the action. Vannoy v. Uniroyal Tire Co., 111 Idaho 536, 726 P.2d 648 (1985).

Sellers of Used Products.
Where there was no previous existing law with respect to the liability of sellers of used products, this chapter was not modifying the existing common law with regard to such, even though this section contemplates that existing common law would be modified to the extent that it was inconsistent with the act. Peterson v. Idaho First Nat'l Bank, 117 Idaho 724, 791 P.2d 1303 (1990).

Survival of Actions.
Although this chapter makes reference to claims "asserted on behalf of an estate," that reference is directly related to the act's dis-

cussion of wrongful death actions, not actions of the decedent which might survive his or her death. Estate of Shaw v. Dauphin Graphic Machs., Inc., 392 F. Supp. 2d 1230 (D. Idaho 2005), rev'd in part, 240 Fed. Appx. 177 (9th Cir. 2007).

Cited in: Duff v. Bonner Bldg. Supply, Inc., 103 Idaho 432, 649 P.2d 391 (Ct. App. 1982); Galbraith v. Vangas, Inc., 103 Idaho 912, 655 P.2d 119 (Ct. App. 1982); Jenkins v. Armstrong World Indus., Inc., 643 F. Supp. 17 (D. Idaho 1985); Wefco, Inc. v. Monsanto Co., 111 Idaho 55, 720 P.2d 643 (Ct. App. 1986); Oats v. Nissan Motor Corp., 126 Idaho 162, 879 P.2d 1095 (1994).

RESEARCH REFERENCES

A.L.R. — Products Liability: Ladders. 81 A.L.R.5th 245.

6-1402. Definitions. — (1) "Product seller" means any person or entity that is engaged in the business of selling products, whether the sale is for resale, or for use or consumption. The term includes a manufacturer, wholesaler, distributor, or retailer of the relevant product. The term also includes a party who is in the business of leasing or bailing such products. The term "product seller" does not include:

(a) A provider of professional services who utilizes or sells products within the legally authorized scope of its professional practice. A nonprofessional provider of services is not included unless the sale or use of a product is the principal part of the transaction, and the essence of the relationship between the seller and purchaser is not the furnishing of judgment, skill, or services;

(b) A commercial seller of used products who resells a product after use by a consumer or other product user, provided the used product is in essentially the same condition as when it was acquired for resale; and

(c) A finance lessor who is not otherwise a product seller. A "finance lessor" is one who acts in a financial capacity, who is not a manufacturer, wholesaler, distributor, or retailer, and who leases a product without having a reasonable opportunity to inspect and discover defects in the product, under a lease arrangement in which the selection, possession, maintenance, and operation of the product are controlled by a person other than the lessor.

(2) "Manufacturer" includes a product seller who designs, produces, makes, fabricates, constructs, or remanufactures the relevant product or component part of a product before its sale to a user or consumer. It includes a product seller or entity not otherwise a manufacturer that holds itself out as a manufacturer. A product seller acting primarily as a wholesaler, distributor, or retailer of a product may be a "manufacturer" but only to the extent that it designs, produces, makes, fabricates, constructs, or remanufactures the product before its sale.

(3) "Product" means any object possessing intrinsic value, capable of delivery either as an assembled whole or as a component part or parts, and produced for introduction into trade or commerce. Human tissue and organs, including human blood and its components, are excluded from this term. The "relevant product" under this chapter is that product, or its component part or parts, which gave rise to the product liability claim.

(4) "Claimant" means a person or entity asserting a product liability claim, including a wrongful death action, and, if the claim is asserted through or on behalf of an estate, the term includes claimant's decedent. "Claimant" includes any person or entity that suffers harm.

(5) "Reasonably anticipated conduct" means the conduct which would be expected of an ordinary reasonably prudent person who is likely to use the product in the same or similar circumstances.

History.

I.C., § 6-1302, as added by 1980, ch. 225, § 1, p. 499; am. and redesig. 2005, ch. 25, § 4, p. 82.

JUDICIAL DECISIONS

ANALYSIS

Commercial sellers of used products.
"Manufacturer."

Commercial Sellers of Used Products.

The language in subdivision (1)(b) of this section is clear and unambiguous and excludes the commercial seller of used products from the definition of a product seller under the Product Liability Reform Act. Peterson v. Idaho First Nat'l Bank, 117 Idaho 724, 791 P.2d 1303 (1990).

Where there was no previous existing law with respect to the liability of sellers of used products, the Product Liability Reform Act was not modifying the existing common law with regard to such, even though § 6-1401 contemplates that existing common law would be modified to the extent that it was inconsistent with the act. Peterson v. Idaho First Nat'l Bank, 117 Idaho 724, 791 P.2d 1303 (1990).

"Manufacturer."

Based on the parties' express agreement and the degree of distribution company's involvement in the actual production of the product for distribution in this country, there was substantial, competent evidence in the record to support the trial court's finding that distribution company held itself out as a manufacturer; trial court did not err in imputing distribution company's liability to retailer. Hawks v. EPI Prods. USA, Inc., 129 Idaho 281, 923 P.2d 988 (1996).

6-1403. Length of time product sellers are subject to liability. — (1) Useful safe life.

(a) Except as provided in subsection (1)(b) hereof, a product seller shall not be subject to liability to a claimant for harm under this chapter if the product seller proves by a preponderance of the evidence that the harm was caused after the product's "useful safe life" had expired.

"Useful safe life" begins at the time of delivery of the product and extends for the time during which the product would normally be likely to perform or be stored in a safe manner. For the purposes of this chapter, "time of delivery" means the time of delivery of a product to its first purchaser or lessee who was not engaged in the business of either selling such products or using them as component parts of another product to be sold.

(b) A product seller may be subject to liability for harm caused by a product used beyond its useful safe life to the extent that the product seller has expressly warranted the product for a longer period.

(2) Statute of repose.

(a) Generally. In claims that involve harm caused more than ten (10) years after time of delivery, a presumption arises that the harm was

caused after the useful safe life had expired. This presumption may only be rebutted by clear and convincing evidence.

(b) Limitations on statute of repose.

1. If a product seller expressly warrants that its product can be utilized safely for a period longer than ten (10) years, the period of repose, after which the presumption created in subsection (2)(a) hereof arises, shall be extended according to that warranty or promise.

2. The ten (10) year period of repose established in subsection (2)(a) hereof does not apply if the product seller intentionally misrepresents facts about its product, or fraudulently conceals information about it, and that conduct was a substantial cause of the claimant's harm.

3. Nothing contained in subsection (2) of this section shall affect the right of any person found liable under this chapter to seek and obtain contribution or indemnity from any other person who is responsible for harm under this chapter.

4. The ten (10) year period of repose established in subsection (2)(a) hereof shall not apply if the harm was caused by prolonged exposure to a defective product, or if the injury-causing aspect of the product that existed at the time of delivery was not discoverable by an ordinary reasonably prudent person until more than ten (10) years after the time of delivery, or if the harm, caused within ten (10) years after the time of delivery, did not manifest itself until after that time.

(3) Statute of limitation. No claim under this chapter may be brought more than two (2) years from the time the cause of action accrued as defined in section 5-219, Idaho Code.

History.

I.C., § 6-1303, as added by 1980, ch. 225, § 1, p. 499; am. and redesig. 2005, ch. 25, § 5, p. 82.

JUDICIAL DECISIONS

Analysis

Accrual of action.
Action barred.
Burden of proof.
Constitutionality.
Legislative intent.
Rebuttable presumption.

Accrual of Action.

Under § 5-219, a cause of action accrues at the time of the wrongdoing, rather than at the time of discovery of the wrongful act. Wing v. Martin, 107 Idaho 267, 688 P.2d 1172 (1984).

Subdivision 4 of § 5-219 is an integral part of the Idaho Products Liability Act because it defines "accrual" of causes of action under the Act. Jenkins v. Armstrong World Indus., Inc., 643 F. Supp. 17 (D. Idaho 1985).

Action Barred.

Where wrongful labeling of chemical by defendant chemical company occurred, if at all, at the time of the sale of the chemical to the former lessees, and such sale was more than three years prior to the filing of the amended complaint, the improper labeling claim was barred under either § 5-218 3. or subsection (3) of this section. Wing v. Martin, 107 Idaho 267, 688 P.2d 1172 (1984).

Burden of Proof.

Worker did not carry his burden of presenting clear and convincing evidence rebutting the presumption, arising under subsection (2)(a), that the useful safe life of splitter had expired by the date of his accident. Worker did not show that machines with regular — not extraordinary — maintenance lasted beyond the ten year limit. Pate v. Columbia Mach., Inc., 930 F. Supp. 451 (D. Idaho 1996).

A plaintiff defending a motion for summary judgment does not have to meet the clear and convincing evidence standard in rebutting the presumption of a ten year useful life under this section, and where the plaintiff submits evidence a product was operating safely at the time of an accident the plaintiff has produced a triable issue of fact. West v. Sonke, 132 Idaho 133, 968 P.2d 228 (1998).

Constitutionality.

This section impacts social and economic areas and must be evaluated under the rational basis test which provides that equal protection is denied and offended only if the classification is based solely on reasons totally unrelated to the pursuit of the state's goals and only if no grounds can be advanced to justify those goals. Olsen v. J.A. Freeman Co., 117 Idaho 706, 791 P.2d 1285 (1990).

This section is constitutional under the rational basis test as having a reasonably conceived objective and advancing legitimate legislative goals in a rational fashion. Olsen v. J.A. Freeman Co., 117 Idaho 706, 791 P.2d 1285 (1990).

The statute of repose contained in this section does not violate the "open courts" provision of Const., Art. 1, § 18. Olsen v. J.A. Freeman Co., 117 Idaho 706, 791 P.2d 1285 (1990).

The product liability statute of repose under this section is not so vague as to deny plaintiff due process of law. Olsen v. J.A. Freeman Co., 117 Idaho 706, 791 P.2d 1285 (1990).

Legislative Intent.

The legislative purpose of Idaho's statute of repose was to provide for the maximum length of time product sellers are subject to liability. Olsen v. J.A. Freeman Co., 117 Idaho 706, 791 P.2d 1285 (1990).

This section advances a policy of finality in legal relationships and, thus, furthers the objective of the legislature by providing for the maximum length of time product sellers are subject to liability. Olsen v. J.A. Freeman Co., 117 Idaho 706, 791 P.2d 1285 (1990).

Rebuttable Presumption.

This section creates a rebuttable presumption that a product's useful safe life has expired with regard to those claims that involve harm or injury occurring more than ten years after time of delivery, and failure to rebut the presumption with clear and convincing evidence bars a claim. Olsen v. J.A. Freeman Co., 117 Idaho 706, 791 P.2d 1285 (1990).

Where plaintiff failed to present any evidence that a baler's useful safe life had not expired, as is necessary to rebut the statutorily imposed period of repose, the district court did not err in granting summary judgment. Olsen v. J.A. Freeman Co., 117 Idaho 706, 791 P.2d 1285 (1990).

Farm worker injured by a ten-year-old potato harvester failed to present any evidence to rebut the presumed fact that the harm was caused after the useful safe life of the potato harvester had expired, and thus, worker's product liability claim was barred. Mercado v. Baker, 117 Idaho 777, 792 P.2d 342 (1990).

Subsection (2)(a) establishes a presumption that the useful safe life of all products expires ten years after the date of delivery. Thus, a product seller need only show that the harm was caused more than ten years after the date of delivery and it will be presumed that the harm occurred after the product's useful safe life, and that the product seller is immune from liability. Oats v. Nissan Motor Corp., 126 Idaho 162, 879 P.2d 1095 (1994).

The burden of proof is on the products liability plaintiff to rebut by clear and convincing evidence the presumption that the product's useful safe life expired after ten years and show that the harm was actually caused before the product's useful safe life expired. Rebuttal of the presumed ten-year period of repose by clear and convincing evidence is not the only method provided for plaintiffs to avoid the effects of the statute of repose; subsection (2)(b) of this section sets forth a number of limitations which, if shown by the plaintiff, preclude application of the presumptive ten-year period of repose. Oats v. Nissan Motor Corp., 126 Idaho 162, 879 P.2d 1095 (1994).

Cited in: Allen v. A.H. Robins Co., 752 F.2d 1365 (9th Cir. 1985); Waters v. Armstrong World Indus., Inc., 773 F.2d 248 (9th Cir. 1985); Corbridge v. Clark Equip. Co., 112 Idaho 85, 730 P.2d 1005 (1986).

6-1404. Comparative responsibility. — Comparative responsibility shall not bar recovery in an action by any person or his legal representative to recover damages for product liability resulting in death or injury to person or property, if such responsibility was not as great as the responsibility of the person against whom recovery is sought, but any damages allowed shall be diminished in the proportion to the amount of responsibility attributable to the person recovering.

History.
I.C., § 6-1304, as added by 1980, ch. 225, § 1, p. 499; am. and redesig. 2005, ch. 25, § 6, p. 82.

JUDICIAL DECISIONS

ANALYSIS

Application.
Although this section states that comparative negligence shall not be a bar to recover personal injuries, its application is limited to instances where the plaintiff's responsibility for his injuries is less than that of the manufacturer. Puckett v. Oakfabco, Inc., 132 Idaho 816, 979 P.2d 1174 (1999).

Assumption of Risk.
It is clear that the Idaho Product Liability Reform Act allows the defense of assumption of the risk and product misuse as a component of comparative negligence; such issues should be discussed in terms of contributory negligence, not assumption of risk, and applied accordingly under comparative negligence laws. Watson v. Navistar Int'l Transp. Corp., 121 Idaho 643, 827 P.2d 656 (1992).

Jury Instructions.
The trial court's instructions to the jury included instructions concerning defendant's general affirmative defense that plaintiff acted negligently and failed to use ordinary care for his own safety; although the instructions to the jury did not use the words "assumption of the risk" or "misuse," the jury instructions given adequately explained plaintiff's duty of due care and defendant's defense of comparative responsibility. Watson v. Navistar Int'l Transp. Corp., 121 Idaho 643, 827 P.2d 656 (1992).

Where defendant requested an instruction that defined product misuse as the failure to follow directions and warnings provided by the seller but the user's failure to follow directions was another aspect of comparative responsibility encompassed by the court's given instructions, it was not error for the trial court to refuse the requested instruction. Watson v. Navistar Int'l Transp. Corp., 121 Idaho 643, 827 P.2d 656 (1992).

Although it was clear that both jury instruction nos. 17 and 19 contained language concerning defendant/manufacturer's duty of care, this repetition was not prejudicial; instruction no. 19 stated the duty of care of both parties fully while instruction no. 17 repeated the duty of care for the manufacturer. Any undue prominence given by this instruction was offset by given instruction no. 9 which defined negligence as the failure to use the ordinary care that a "reasonable careful person would use under circumstances similar to those shown" by the evidence. Watson v. Navistar Int'l Transp. Corp., 121 Idaho 643, 827 P.2d 656 (1992).

Jury Verdict Form.
All negligent actors contributing to the causation of any accident or injuries are required to be listed on the jury verdict form, whether or not they are parties to the action. Vannoy v. Uniroyal Tire Co., 111 Idaho 536, 726 P.2d 648 (1985).

Where, in a personal injury action against tire manufacturer, evidence in the record identified the manufacturers of the mounting machine and wheel rim as manufacturers of products containing defects which proximately caused or contributed to, in whole or in part, the damages complained of, the trial court was required to include their names on the jury verdict form in order for the jury to evaluate and attribute to their products (the tire mounting machine and the wheel rim) that portion of the cause of the accident which those two items contributed or were responsible for, regardless whether the manufacturers could have had a judgment rendered against them. Vannoy v. Uniroyal Tire Co., 111 Idaho 536, 726 P.2d 648 (1985).

Reduction of Damages.
Once a manufacturer proves by a preponderance of the evidence that an alleged defect or danger is obvious, the fact finder will reduce the plaintiff's damages according to the plaintiff's own negligence in failing to observe the danger. Puckett v. Oakfabco, Inc., 132 Idaho 816, 979 P.2d 1174 (1999).

Cited in: Lasselle v. Special Prods. Co., 106 Idaho 170, 677 P.2d 483 (1983); Salinas v. Vierstra, 107 Idaho 984, 695 P.2d 369 (1985); Hickman v. Fraternal Order of Eagles, 114 Idaho 545, 758 P.2d 704 (1988); Pate v. Columbia Mach., Inc., 930 F. Supp. 451 (D. Idaho 1996).

6-1405. Conduct affecting comparative responsibility. — (1) Failure to discover a defective condition.

(a) Claimant's failure to inspect. A claimant is not required to have inspected the product for a defective condition. Failure to have done so does not render the claimant responsible for the harm caused or reduce the claimant's damages.

(b) Claimant's failure to observe an obvious defective condition. When the product seller proves by a preponderance of the evidence that the claimant, while using the product, was injured by a defective condition that would have been obvious to an ordinary reasonably prudent person, the claimant's damages shall be subject to reduction.

(c) A nonclaimant's failure to inspect for defects or to observe an obvious defective condition. A nonclaimant's failure to inspect for a defective condition or to observe a defective condition that would have been obvious to an ordinary reasonably prudent person, shall not reduce claimant's damages.

(2) Use of a product with a known defective condition.

(a) By a claimant. When the product seller proves, by a preponderance of the evidence, that the claimant knew about the product's defective condition, and voluntarily used the product or voluntarily assumed the risk of harm from the product, the claimant's damages shall be subject to reduction to the extent that the claimant did not act as an ordinary reasonably prudent person under the circumstances.

(b) By a nonclaimant product user. If the product seller proves by a preponderance of the evidence that a product user, other than the claimant, knew about a product's defective condition, but voluntarily and unreasonably used or stored the product and thereby proximately caused claimant's harm, the claimant's damages shall be subject to apportionment.

(3) Misuse of a product.

(a) "Misuse" occurs when the product user does not act in a manner that would be expected of an ordinary reasonably prudent person who is likely to use the product in the same or similar circumstances.

(b) When the product seller proves, by a preponderance of the evidence, that product misuse by a claimant, or by a party other than the claimant or the product seller has proximately caused the claimant's harm, the claimant's damages shall be subject to reduction or apportionment to the extent that the misuse was a proximate cause of the harm.

(4) Alteration or modification of a product.

(a) "Alteration or modification" occurs when a person or entity other than the product seller changes the design, construction, or formula of the product, or changes or removes warnings or instructions that accompanied or were displayed on the product. "Alteration or modification" of a product includes the failure to observe routine care and maintenance, but does not include ordinary wear and tear.

(b) When the product seller proves, by a preponderance of the evidence, that an alteration or modification of the product by the claimant, or by a party other than the claimant or the product seller has proximately

caused the claimant's harm, the claimant's damages shall be subject to reduction or apportionment to the extent that the alteration or modification was a proximate cause of the harm.

This subsection shall not be applicable if:

1. The alteration or modification was in accord with the product seller's instructions or specifications;
2. The alteration or modification was made with the express or implied consent of the product seller; or
3. The alteration or modification was reasonably anticipated conduct, and the product was defective because of the product seller's failure to provide adequate warnings or instructions with respect to the alteration or modification.

History.

I.C., § 6-1305, as added by 1980, ch. 225, § 1, p. 499; am. and redesig. 2005, ch. 25, § 7, p. 82.

JUDICIAL DECISIONS

Analysis

Genuine issues of facts.
Judgment notwithstanding the verdict.
Jury instructions.
Misuse.
Open and obvious danger.
Percentage of negligence.
Question for jury.
Standard of duty to warn.

Genuine Issues of Facts.

Genuine issues of fact remained as to the defectiveness of warnings and the grain auger covers, and as to whether the alteration of the covers, as compared to the design of the covers, proximately caused plaintiff's injuries; thus, granting of summary judgment was vacated. Tuttle v. Sudenga Indus., Inc., 125 Idaho 145, 868 P.2d 473 (1994).

Judgment Notwithstanding the Verdict.

Viewing the evidence in a light most favorable to plaintiff/farmer injured in combine, the court could not hold as a matter of law whether a better warning decal or whether appropriate safety information in the owner's manual may have deterred or prevented plaintiff's actions; therefore, rather than second-guess the jury's determination of proximate cause from failure to warn, the Idaho supreme court affirmed the trial judge's decision denying defendant's motion for judgment notwithstanding the verdict. Watson v. Navistar Int'l Transp. Corp., 121 Idaho 643, 827 P.2d 656 (1992).

Jury Instructions.

The trial court's instructions to the jury included instructions concerning defendant's general affirmative defense that plaintiff acted negligently and failed to use ordinary care for his own safety. Although the instructions to the jury did not use the words "assumption of the risk" or "misuse," the jury instructions given adequately explained plaintiff's duty of due care and defendant's defense of comparative responsibility; accordingly, there was no error. Watson v. Navistar Int'l Transp. Corp., 121 Idaho 643, 827 P.2d 656 (1992).

Where defendant requested an instruction that defined product misuse as the failure to follow directions and warnings provided by the seller but the user's failure to follow directions was another aspect of comparative responsibility encompassed by the court's given instructions, it was not error for the trial court to refuse the requested instruction. Watson v. Navistar Int'l Transp. Corp., 121 Idaho 643, 827 P.2d 656 (1992).

Misuse.

A manufacturer has no duty to foresee, protect, or warn against product misuse. Corbridge v. Clark Equip. Co., 112 Idaho 85, 730 P.2d 1005 (1986).

Product misuse is an affirmative defense in an action against a manufacturer. Corbridge v. Clark Equip. Co., 112 Idaho 85, 730 P.2d 1005 (1986).

The trial court's ruling, as a matter of law, that the towing of forklift/loader normally used to load and unload grain, clean up grain

spills, and push railroad cars through deep snow over a rough railroad crossing with an abrupt incline constituted misuse, would be upheld. Corbridge v. Clark Equip. Co., 112 Idaho 85, 730 P.2d 1005 (1986).

While the language defining misuse in subdivision (3)(a) of this section creates a jury question, where the undisputed facts lead to only one reasonable conclusion, the court may rule as a matter of law. Corbridge v. Clark Equip. Co., 112 Idaho 85, 730 P.2d 1005 (1986).

Open and Obvious Danger.

The provisions of this section limit and define the open and obvious danger doctrine in a products liability case. Watson v. Navistar Int'l Transp. Corp., 121 Idaho 643, 827 P.2d 656 (1992).

This section incorporates the doctrine of open and obvious danger as a component part of comparative negligence. Puckett v. Oakfabco, Inc., 132 Idaho 816, 979 P.2d 1174 (1999).

Once a manufacturer proves by a preponderance of the evidence that an alleged defect or danger is obvious, the fact finder will reduce the plaintiff's damages according to the plaintiff's own negligence in failing to observe the danger. Puckett v. Oakfabco, Inc., 132 Idaho 816, 979 P.2d 1174 (1999).

Percentage of Negligence.

In light of the adoption of comparative negligence in Idaho, the adequacy of a warning is a factor to be considered and determined by the jury. Where there is substantial competent evidence that a manufacturer may have inadequately warned potential users of a danger or defect, the user's percentage of comparative negligence will determine the reduction in the plaintiff's damages to the extent that the plaintiff did not act as an ordinary reasonably prudent person under the circumstances. Watson v. Navistar Int'l Transp. Corp., 121 Idaho 643, 827 P.2d 656 (1992).

Question for Jury.

The language in subdivision (4)(a) of this section creates a jury question, unless the court is able to rule as a matter of law that the facts are undisputed and lead to one reasonable conclusion; since reasonable minds could find that facilitating removal of covers on grain auger to better load grain and forestall further mangling of covers was reasonably anticipated conduct, summary disposition of the case was incorrect. Tuttle v. Sudenga Indus., Inc., 125 Idaho 145, 868 P.2d 473 (1994).

Standard of Duty to Warn.

It is clear that this section incorporates the doctrine of open and obvious danger as a component part of the comparative negligence theory and adopts the objective standard of duty to warn to the "ordinary reasonably prudent person;" an objective standard makes non-dispositive an inquiry into the subjective knowledge of the user. As a policy matter, the standard is used to determine whether the danger involved is so obvious that it is unreasonable to impose on the manufacturer a duty to warn; as a result, a product with a danger that is obvious to a particular user may not entirely relieve the manufacturer of a duty to warn of that danger or defect. Instead, it will simply be one of the factors that the jury may consider after being instructed to consider the obviousness of the danger in determining the degree of negligence. Watson v. Navistar Int'l Transp. Corp., 121 Idaho 643, 827 P.2d 656 (1992).

Where plaintiff presented evidence that there was an inadequate "caution" decal on a combine and that a "danger" symbol and a graphical decal showing a person's leg caught in an auger should have been used and the plaintiff offered further evidence that the operator's manual failed to indicate that the combine should be adjusted for grass seed harvesting, construing all of the evidence in favor of plaintiff as the court is required to do, the court could not hold as a matter of law that the danger imposed by the auger was so plain, open and obvious that it precluded a duty to warn. Watson v. Navistar Int'l Transp. Corp., 121 Idaho 643, 827 P.2d 656 (1992).

Where the plaintiff placed a ladder on a wet concrete floor, propping it against the rounded surface of a boiler, and where he stood on the unsecured ladder at a point above where it made contact with the boiler, the dangers involved in his use of the ladder were so obvious that imposing a duty on the defendants to warn would have served no function, and the trial court properly granted defendants' motion for summary judgment on the claim relating to failure to warn. Puckett v. Oakfabco, Inc., 132 Idaho 816, 979 P.2d 1174 (1999).

Cited in: Pate v. Columbia Mach., Inc., 930 F. Supp. 451 (D. Idaho 1996).

6-1406. Relevance of industry custom, safety or performance standards, and technological feasibility. — (1) Evidence of changes in (a) a product's design, (b) warnings or instructions concerning the product, (c) technological feasibility, (d) "state of the art," or (e) the custom of the

product seller's industry or business, occurring after the product was manufactured and delivered to its first purchaser or lessee who was not engaged in the business of either selling such products or using them as component parts of another product to be sold, is not admissible for the purpose of proving that the product was defective in design or that a warning or instruction should have accompanied the product at the time of manufacture. The provisions of this section shall not relieve the product seller of any duty to warn of known defects discovered after the product was designed and manufactured.

(2) If the court finds outside the presence of a jury that the probative value of such evidence substantially outweighs its prejudicial effect and that there is no other proof available, this evidence may be admitted for other relevant purposes, including but not limited to proving ownership or control, or impeachment.

(3) For purposes of this section, "custom" refers to the practices followed by an ordinary product seller in the product seller's industry or business.

(4) For purposes of this section, "technological feasibility" means the technological, mechanical and scientific knowledge relating to product safety that was reasonably feasible for use, in light of economic practicality, at the time of manufacture.

History.
I.C., § 6-1306, as added by 1980, ch. 225, § 1, p. 499; am. and redesig. 2005, ch. 25, § 8, p. 82.

JUDICIAL DECISIONS

Evidence.
If it appears that a party is seeking the introduction of evidence of subsequent remedial measures to imply culpability under the guise of impeachment or any other purpose, certainly the trial court should disallow the evidence; however, the trial court is in the best position to assess the prejudicial effect of the evidence. If the trial court is satisfied that the evidence has substantial probative value on the issue on which it is introduced and that the issue is genuinely in dispute, it should be allowed and a limiting instruction can aid the jury, but if the trial court concludes that factors of undue prejudice, confusion of issues, misleading the jury or a waste of time outweigh the probative value of the evidence, it should properly be excluded. Watson v. Navistar Int'l Transp. Corp., 121 Idaho 643, 827 P.2d 656 (1992).

6-1407. Individual rights and responsibilities of product sellers other than manufacturers. — (1) In the absence of express warranties to the contrary, product sellers other than manufacturers shall not be subject to liability in circumstances where they do not have a reasonable opportunity to inspect the product in a manner which would or should, in the exercise of reasonable care, reveal the existence of the defective condition which is in issue; or where the product seller acquires the product in a sealed package or container and sells the product in the same sealed package or container. The liability limitation of this subsection shall not apply if:

(a) The product seller had knowledge or reason to know of the defect in the product;

(b) The product seller altered, modified, or installed the product, and such alteration, modification or installation was a substantial proximate cause of the incident giving rise to the action, was not authorized or requested

by the manufacturer and was not performed in compliance with the directions or specifications of the manufacturer;

(c) The product seller provided the plans or specifications for the manufacture or preparation of the product and such plans or specifications were a substantial cause of the product's alleged defect.

(d) The product seller is a wholly-owned subsidiary of the manufacturer, or the manufacturer is a wholly-owned subsidiary of the product seller.

(e) The product seller sold the product after the expiration date placed on the product or its package by the manufacturer.

(2) In an action where the liability limitation of subsection (1) applies, any manufacturer who refuses to accept a tender of defense from the product seller, shall indemnify the product seller for reasonable attorney's fees and costs incurred by the product seller in defending such action.

(3) In any product liability action, the manufacturer of the product shall be indemnified by the product seller of the product for any judgment rendered against the manufacturer and shall also be reimbursed for reasonable attorney's fees and costs incurred in defending such action:

(a) If the product seller provided the plans or specifications for the manufacture or preparation of the product;

(b) If such plans or specifications were a substantial cause of the product's alleged defect; and

(c) If the product was manufactured in compliance with and according to the plans or specifications of the seller.

The provisions of this subsection shall not apply if the manufacturer had knowledge or with the exercise of reasonable and diligent care should have had knowledge of the defect in the product.

(4) A product seller, other than a manufacturer, is also subject to the liability of manufacturer if:

(a) The manufacturer is not subject to service of process under the laws of the claimant's domicile; or

(b) The manufacturer has been judicially declared insolvent in that the manufacturer is unable to pay its debts as they become due in the ordinary course of business; or

(c) The court outside the presence of a jury determines that it is highly probable that the claimant would be unable to enforce a judgment against the product manufacturer.

History.
I.C., § 6-1307, as added by 1980, ch. 225, § 1, p. 499; am. and redesig. 2005, ch. 25, § 9, p. 82.

JUDICIAL DECISIONS

Analysis

Cross-claim not a prerequisite.
Indemnification.
Liability of distributor.
Liability of seller/retailer.
Mere allegations in complaint.
Reimbursement for costs and fees.
Summary judgment inappropriate.

Cross-Claim Not a Prerequisite.

The filing of a cross-claim is not a prerequisite to an award under this section. Meldco, Inc. v. Hollytex Carpet Mills, Inc., 118 Idaho 265, 796 P.2d 142 (Ct. App. 1990).

Indemnification.

This section relieves certain product sellers of liability and, upon a tender of the defense, triggers the manufacturer's duty to indemnify the seller "in the absence of express warranties." Wefco, Inc. v. Monsanto Co., 111 Idaho 55, 720 P.2d 643 (Ct. App. 1986), rev'd on other grounds, Borchard v. Wefco, Inc., 112 Idaho 555, 733 P.2d 776 (1987).

Liability of Distributor.

Based on the parties' express agreement and the degree of distribution company's involvement in the actual production of the product for distribution in this country, there was substantial, competent evidence in the record to support the trial court's finding that distribution company held itself out as a manufacturer; trial court did not err in imputing distribution company's liability to retailer pursuant to subsection (4) of this section. Hawks v. EPI Prods. USA, Inc., 129 Idaho 281, 923 P.2d 988 (1996).

Distributor of fencing was not liable for the injury of a skier who crashed through the fence and into a ski lift tower where the fences were shipped by the manufacturer in sealed individual packages that remained sealed until delivery to the ski resort and the distributor took no part in the design or manufacture of the fence. Collins v. Schweitzer, Inc., 774 F. Supp. 1253 (D. Idaho 1991), aff'd, 21 F.3d 1491 (9th Cir.), cert. denied, 513 U.S. 962, 115 S. Ct. 422, 130 L. Ed. 2d 337 (1994).

Liability of Seller/Retailer.

Where plaintiff alleged that combine had defective braking system, seller may be liable under the Idaho Product Liability Reform Act only if one of the following events occurred: (1) seller made express warranties concerning the design of the combine's braking system that were inconsistent with those made by manufacturer; (2) seller had a reasonable opportunity to inspect the braking system and should have discovered any alleged defect; (3) seller had reason to know of the alleged defect; (4) seller altered, modified, or installed the system causing the injury. Hoopes v. Deere & Co., 117 Idaho 386, 788 P.2d 201 (1990).

Mere Allegations in Complaint.

The mere allegations in a complaint do not dictate whether indemnity will be allowed under this section. Meldco, Inc. v. Hollytex Carpet Mills, Inc., 118 Idaho 265, 796 P.2d 142 (Ct. App. 1990).

Reimbursement for Costs and Fees.

The retailer is not entitled to an award of attorney fees and costs simply because it has tendered the defense and is absolved of liability when the manufacturer is also absolved of liability. Borchard v. Wefco, Inc., 112 Idaho 776, 733 P.2d 776 (1987).

Summary Judgment Inappropriate.

Where there were genuine issues of fact concerning whether the seller had made express warranties, had a reasonable opportunity to inspect the product, or had altered or modified the product, summary judgment for the seller was inappropriate. Green v. A.B. Hagglund & Soner, 634 F. Supp. 790 (D. Idaho 1986).

Trial court properly concluded retailer was immune from direct liability for consumer's injuries pursuant to this section where there was no finding that retailer made an express warranty regarding use of the product that was inconsistent with the express warranties made by distributor and manufacturer and no finding that retailer altered, modified or otherwise changed the product's packaging or information, and it was found that, while retailer had a reasonable opportunity to inspect the product, it did not know or have reason to know of the products defective warning. Hawks v. EPI Prods. USA, Inc., 129 Idaho 281, 923 P.2d 988 (1996).

6-1408. Contents of complaint — Amount of recovery. — In any product liability action no dollar amount or figure shall be included in the complaint. The complaint shall pray for such damages as are reasonable in the premises. The complaint shall include a statement reciting that the jurisdictional amount established for filing the action is satisfied.

History.

I.C., § 6-1308, as added by 1980, ch. 225, § 1, p. 499; am. and redesig. 2005, ch. 25, § 10, p. 82.

6-1409. Short title. — This act shall be known and may be cited as the "Idaho Product Liability Reform Act."

History.
I.C., § 6-1309, as added by 1980, ch. 225, § 1, p. 499; am. and redesig. 2005, ch. 25, § 11, p. 82.

STATUTORY NOTES

Compiler's Notes.
The words "this act" refer to S.L. 1980, ch. 225 compiled as §§ 6-1401 to 6-1409.

Section 2 of S. L. 1980, ch. 225 read: "The provisions of this act are hereby declared to be severable and if any provision of this act or the application of such provision to any person or circumstance is declared invalid for any reason, such declaration shall not affect the validity of remaining portions of this act."

Effective Dates.
Section 3 of S.L. 1980, ch. 225 provided that the act should be effective with regard to all product liability actions filed on or after July 1, 1980.

6-1410. Products liability — Defectiveness of firearms or ammunition. — (1) In a products liability action, no firearm or ammunition shall be deemed defective in design on the basis that the benefits of the product do not outweigh the risk of injury posed by its potential to cause serious injury, damage, or death when discharged.

(2) For purposes of this section:

(a) The potential of a firearm or ammunition to cause serious injury, damage, or death when discharged does not make the product defective in design.

(b) Injuries or damages resulting from the discharge of a firearm or ammunition are not proximately caused by its potential to cause serious injury, damage, or death, but are proximately caused by the actual discharge of the product.

(3) The provisions of this section shall not affect a products liability cause of action based upon the improper selection of design alternatives.

History.
I.C., § 6-1410, as added by 1986, ch. 216, § 1, p. 553.

RESEARCH REFERENCES

A.L.R. — Products liability: firearms, ammunition, and chemical weapons. 96 A.L.R.5th 239.

CHAPTER 15

LIABILITY TO FIREWOOD GATHERERS

SECTION.

6-1501. Definitions. — As used in this chapter:

(1) "Firewood gatherer" means a person who enters onto forest land with or without the consent of the owner of the forest land or by payment of a fee in order to gather or cut wood for use as firewood.

(2) "Forest land" means any privately owned land being held and used for the continuous purpose of growing and harvesting trees of a marketable species.

History.
I.C., § 6-1501, as added by 1986, ch. 194, § 1, p. 492.

6-1502. Owners of forest land exempt from liability — Exception. — Notwithstanding any other provision of law, an owner of forest land shall not be liable to a firewood gatherer for damages or injuries to the firewood gatherer arising from the condition of the forest land or the forest products attached to or upon the forest land unless the damage or injury is caused by the gross negligence, recklessness or intentional misconduct of the owner of the forest land.

History.
I.C., § 6-1502, as added by 1986, ch. 194, § 1, p. 492.

CHAPTER 16

PERIODIC PAYMENT OF JUDGMENTS — LIMITATION ON CERTAIN TORT DAMAGES AND LIABILITIES

6-1601. Definitions. — As used in this act:

(1) "Charitable corporation or organization or charitable trust" means a corporation or organization or charitable trust including any community chest, fund, or foundation organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation.

(2) "Claimant" means any party to a civil action making a claim for relief, legal or equitable, compensatory or noncompensatory.

(3) "Economic damages" means objectively verifiable monetary loss, including, but not limited to, out-of-pocket expenses, loss of earnings, loss of use of property, cost of replacement or repair, cost of obtaining substitute

domestic services, loss of employment, medical expenses, or loss of business or employment opportunities.

(4) "Future damages" means noneconomic damages and economic damages to be incurred after entry of a judgment.

(5) "Noneconomic damages" means subjective, nonmonetary losses including, but not limited to, pain, suffering, inconvenience, mental anguish, disability or disfigurement incurred by the injured party; emotional distress; loss of society and companionship; loss of consortium; or destruction or impairment of the parent-child relationship.

(6) "Nonprofit corporation or organization" means a charitable corporation or organization or charitable trust; any other corporation organized or existing under chapter 3, title 30, Idaho Code, or an equivalent provision of the law of another state; or an unincorporated association; which corporation, organization, charitable trust or unincorporated association is organized and existing exclusively for nonprofit purposes, and which:

(a) Either is tax exempt under section 501(c)(3) of the Internal Revenue Code or regularly bestows benefits to the community at large, and

(b) No part of the net income of which is distributable to its members, directors or officers.

(7) "Personal injury" means a physical injury, sickness or death suffered by an individual.

(8) "Property damage" means loss in value or in use of real or personal property, where such loss arises from physical damage to or destruction of such property.

(9) "Punitive damages" means damages awarded to a claimant, over and above what will compensate the claimant for actual personal injury and property damage, to serve the public policies of punishing a defendant for outrageous conduct and of deterring future like conduct.

History.

I.C., § 6-1601, as added by 1987, ch. 278, § 1, p. 571; am. 1990, ch. 105, § 1, p. 211; am. 2008, ch. 83, § 1, p. 213.

STATUTORY NOTES

Amendments.

The 2008 amendment, by ch. 83, in subsection (1), twice inserted "or charitable trust"; subdivided subsection (6) into paragraphs (a) and (b); in the introductory paragraph of subsection (6), inserted "or charitable trust" and "organization, charitable trust"; and in paragraph (6)(a), added "Either is tax exempt under section 501(c)(3) of the Internal Revenue Code or."

Federal References.

Section 501(c)(3) of the Internal Revenue Code, referred to in paragraph (6)(a), is codified as 26 U.S.C.S. § 501(c)(3).

Compiler's Notes.

The words "this act", in the introductory paragraph, refer to S.L. 1987, ch. 278, which is codified as §§ 5-335, 5-336, 6-801 to 6-804, 6-807, 6-1601 to 6-1605, 12-123, 12-301 to 12-303, 28-22-104, 41-1329, 41-1329A, 41-1815, 41-2401, and 72-311. Probably, the reference should be to "this chapter," being chapter 16, title 6, Idaho Code.

Effective Dates.

Section 18 of S.L. 1987, ch. 278, as amended by § 1 of S.L. 1990, ch. 121, read: "The provisions of this act shall take effect on July 1, 1987, provided however, that Section [Sections] 1 through 11 shall apply only to causes of action which accrue on and after July 1, 1987."

JUDICIAL DECISIONS

ANALYSIS

Insufficient evidence of economic damages.
Proof of damages.
Punitive damages.

Insufficient Evidence of Economic Damages.

There was insufficient evidence to support the award for economic damages to a father, which would have been incurred by him as a result of the loss of his two-year-old's financial support, because no direct factual evidence or expert testimony was presented to establish the child's potential earning capacity or the cash value of financial support she might have provided her parents in the future. Horner v. Sani-Top, Inc., 143 Idaho 230, 141 P.3d 1099 (2006).

Proof of Damages.

Damages may be recovered in a wrongful death case, even though they are not tied to a financial or pecuniary loss, as such a loss is presumed with respect to loss of society or companionship. It does not mean that if a plaintiff seeks special, or out-of-pocket, damages, there is no need to prove them with any specificity or tie them to a particular loss. Horner v. Sani-Top, Inc., 143 Idaho 230, 141 P.3d 1099 (2006).

In order for an award of special damages to be upheld, the plaintiff must put on some type of proof to support the damage award; compensatory awards based on speculation and conjecture will not be allowed. When considering an award of damages for future losses, the question is whether the plaintiff has proven the damages with reasonable certainty. Horner v. Sani-Top, Inc., 143 Idaho 230, 141 P.3d 1099 (2006).

Punitive Damages.

Punitive damages are reserved for the most unusual and compelling circumstances; the reason for the disfavor with regard to awarding punitive damages is the emphasis on punishment and deterrence rather than compensation of plaintiff, which is the normal role for a civil action. O'Neil v. Vasseur, 118 Idaho 257, 796 P.2d 134 (Ct. App. 1990).

The trial court committed an error of law by choosing to use the defendant's proposed jury instructions, rather than the pattern instructions, where the instructions given failed to instruct the jury that punitive damages are intended to take account of a defendant's egregious actions and punish him accordingly and where the instructions were a misstatement of state law and punitive damages law in general. Schaefer v. Ready, 134 Idaho 378, 3 P.3d 56 (Ct. App. 2000).

Cited in: City of Boise v. Planet Ins. Co., 126 Idaho 51, 878 P.2d 750 (1994).

6-1602. Periodic payment of judgments — Exceptions — Discretions — Procedure. — (1) In any civil action seeking damages for personal injury or property damages in which a verdict, award or finding for future damages exceeds the sum of one hundred thousand dollars ($100,000), the court may, in the exercise of its sound discretion, and at the request of either party, enter a judgment which provides for the periodic payment of that portion of the verdict, award or finding which represents future damages.

(2) If, prior to the entry of judgment, either party requests that the judgment provide for the periodic payments of future damages, the court shall request each party to submit a proposal for such payment which, at a minimum, shall state:

(a) The reasons which demonstrate that the imposition of periodic payments is appropriate or inappropriate, according to the criteria provided in subsections (3), (4) and (5) of this section;

(b) The manner and method of proposed future periodic payments including:

(i) The name or names of each recipient of such payments;

(ii) The number, time, interval and dollar amount of all such payments;

(iii) The total amount to be paid over the course of such payments;

(iv) The present cash value of such payments as of the date when payment is to commence;

(v) The terms and conditions of any annuity policy, contract or investment which a party intends to rely upon as the means of facilitating such payments; and

(vi) The method by which such payments are secured.

(c) Any other factor the court deems appropriate under the prevailing circumstances.

(3) In determining whether periodic payments are appropriate in any given case, the court shall consider, receive evidence and enter findings of fact and conclusions of law on the following:

(a) The age, health, education, occupation experience, medical needs, capacity or incapacity, dependency, and any other special circumstances which, considering the best interests of the claimant, weigh in favor of periodic or lump sum payments;

(b) The financial capacity and resources of the judgment debtor, and any other factors which may affect such debtor's ability to pay the judgment in lump sum, or may otherwise substantially impair the future solvency of such debtor if periodic payments are not ordered;

(c) The degree to which the future damages, losses, expenses and needs are subject to ascertainment with reasonable certainty;

(d) The extent to which an order of future periodic payments may significantly risk that the judgment debtor will be required to pay more than the verdict award or finding, or that the claimant will not be fully and fairly compensated for the future damages;

(e) The existence and amount of any policy of insurance providing coverage, in whole or part, to the judgment debtor for the future damages of the claimant;

(f) The claimant's entitlement to future income, benefits, proceeds or payments from other sources which, with reasonable certainty, may supplement the claimant's future economic needs, damages or expenses;

(g) The extent to which the manner of payment may serve to discourage or deter the tortious, wrongful or otherwise unlawful conduct of the judgment debtor or others similarly situated;

(h) The availability of adequate security to insure that the claimant will receive the full value of the verdict, award or finding;

(i) The extent to which the claimant's attorney will be fully and adequately compensated pursuant to terms of the agreement for representation with the claimant; and

(j) The effect upon any taxes which the claimant will have to pay on the periodic payments.

(4) Unless otherwise agreed to by the claimant, periodic payments shall not be ordered in any case involving an intentional tort, or wrongful conduct perpetrated with or accompanied by fraud, dishonesty, malice, willfulness, gross negligence or which represents an extreme deviation from reasonable standards of conduct.

(5) Any unpaid balance of any judgment shall accrue and bear interest at the legal rate of interest specified in section 28-22-104(2), Idaho Code,

except to the extent such judgment is for future damages. Judgments for future damages shall not bear interest unless such future damages have been reduced to present value in which case the court shall assign an interest rate which is consistent with the methodology used in reducing the amount of such verdict award or finding to present value.

(6) Adequate security shall be required on every judgment ordered payable by periodic means, including the provision of any one or combination of the following:

(a) An annuity contract issued by an insurance company with a financial rating acceptable to the court;

(b) Personal guarantees;

(c) Reinsurance contracts;

(d) Security instruments on real and personal property; or

(e) Such other collateral or security the court may determine appropriate and necessary to ensure full and timely payment of the judgment.

(7) If the court enters a judgment for periodic payments and any security required by the judgment is not given within sixty (60) days, the court shall enter judgment for payment of the future damage award in a lump sum, together with an award of reasonable costs and attorney fees incurred by the claimant relating to the request for periodic payments.

(8) If the court enters an order for periodic payments within sixty (60) days after entry of an order for periodic payments, the judgment debtor may elect not to make the periodic payments and satisfy the judgment for periodic payments by paying the full amount of damages awarded before the order for periodic payments.

(9) If at any time following entry of judgment for periodic payments, a judgment debtor fails to make any payment in full or in a timely fashion, or otherwise according to the terms of the judgment, the claimant may petition the court for an order requiring payment by the judgment debtor of the total remaining amount of the unpaid future damage award and, if necessary, an order allowing execution upon any security given for payment together with such additional penalties, including an award of costs and attorney fees, as the court deems appropriate. In ruling upon such petition the court may consider whether the judgment debtor's failure to make full or timely payment was the result of his excusable inadvertence or the ministerial act of third parties beyond the control of the judgment debtor, together with all equitable considerations which favor granting or denying the petition.

(10) All judgments payable by periodic payments, as provided in this section, shall constitute a property right of the judgment creditor entitled to receive the payments, shall survive the death, disability or incapacity of the judgment creditor, and shall be inheritable, devisable, assignable and otherwise subject to disposition by the judgment creditor as any other form of intangible personal property; provided that nothing contained herein is intended to amend, modify or in any way alter any federal, state or local laws pertaining to taxes which may or may not be assessed against all or any portion of the judgment.

History.
I.C., § 6-1602, as added by 1987, ch. 278, § 1, p. 571.

STATUTORY NOTES

Effective Dates.
Section 18 of S.L. 1987, ch. 278, as amended by § 1 of S.L. 1990, ch. 121, read: "The provisions of this act shall take effect on July 1, 1987, provided however, that Section [Sections] 1 through 11 shall apply only to causes of action which accrue on and after July 1, 1987."

6-1603. Limitation on noneconomic damages. — (1) In no action seeking damages for personal injury, including death, shall a judgment for noneconomic damages be entered for a claimant exceeding the maximum amount of two hundred fifty thousand dollars ($250,000); provided, however, that beginning on July 1, 2004, and each July 1 thereafter, the cap on noneconomic damages established in this section shall increase or decrease in accordance with the percentage amount of increase or decrease by which the Idaho industrial commission adjusts the average annual wage as computed pursuant to section 72-409(2), Idaho Code.

(2) The limitation contained in this section applies to the sum of: (a) noneconomic damages sustained by a claimant who incurred personal injury or who is asserting a wrongful death; (b) noneconomic damages sustained by a claimant, regardless of the number of persons responsible for the damages or the number of actions filed.

(3) If a case is tried to a jury, the jury shall not be informed of the limitation contained in subsection (1) of this section.

(4) The limitation of awards of noneconomic damages shall not apply to:

(a) Causes of action arising out of willful or reckless misconduct.

(b) Causes of action arising out of an act or acts which the trier of fact finds beyond a reasonable doubt would constitute a felony under state or federal law.

History.
I.C., § 6-1603, as added by 1987, ch. 278, § 1, p. 571; am. 2003, ch. 122, § 2, p. 370.

STATUTORY NOTES

Compiler's Notes.
Section 19 of S.L. 1987, ch. 278 read: "The provisions of this act are hereby declared to be severable and if any provision of this act or the application of such provision to any person or circumstance is declared invalid for any reason, such declaration shall not affect the validity of remaining portions of this act."

Section 5 of S.L. 2003, ch. 122 provides: "Severability. The provisions of this act are hereby declared to be severable and if any provision of this act or the application of such provision to any person or circumstance is declared invalid for any reason, such declaration shall not affect the validity of remaining portions of this act."

Effective Dates.
Section 18 of S.L. 1987, ch. 278, as amended by § 1 of S.L. 1990, ch. 121, read: "The provisions of this act shall take effect on July 1, 1987, provided however, that Section [Sections] 1 through 11 shall apply only to causes of action which accrue on and after July 1, 1987."

Section 6 of S.L. 2003, ch. 122 provides: "This act shall be in full force and effect on and after July 1, 2003. Sections 1 through 3 of this act shall apply to all causes of action which accrue thereafter. Section 4 of this act shall apply to all cases in which an appeal is filed thereafter."

JUDICIAL DECISIONS

ANALYSIS

Application.
Constitutionality.
In general.
Legislative intent.
Willful or reckless misconduct.

Application.

Trial court appropriately entered judgment in compliance with this secrtion since not one of the family's damage awards for noneconomic damages in a wrongful death action for their two-year-old child exceeded the statutory cap, and the court correctly initially applied comparative fault to the total damage award for each family member and then multiplied each damage award by the 13% of fault attributable to the product's manufacturer. Horner v. Sani-Top, Inc., 143 Idaho 230, 141 P.3d 1099 (2006).

After properly apportioning liability as found by the jury at trial, a court must then determine whether the total noneconomic damage award for a particular plaintiff exceeds the cap. If so, the court should further reduce each defendant's responsibility on a proportional basis, based upon the jury's allocation of fault so the plaintiff's total judgment does not exceed the cap. Horner v. Sani-Top, Inc., 143 Idaho 230, 141 P.3d 1099 (2006).

Constitutionality.

This section does not violate the right to jury trial as guaranteed by Article I, § 7 of the Idaho Constitution; does not constitute special legislation in violation of Article III, § 19 of the Idaho Constitution; and does not violate the separation of powers doctrine embodied in Article II, § 1 and Article V, § 13 of the Idaho Constitution. Kirkland ex rel. Kirkland v. Blain County Med. Ctr., 134 Idaho 464, 4 P.3d 1115 (2000).

Because the state has a legitimate interest in protecting the availability of liability insurance for Idaho citizens, and this section is neither an arbitrary, capricious, nor unreasonable method for addressing this legitimate societal concern, this section does not violate the constitutional prohibition against special legislation. Kirkland ex rel. Kirkland v. Blain County Med. Ctr., 134 Idaho 464, 4 P.3d 1115 (2000).

In General.

Because the legislature has the power to modify or repeal common law causes of action, and consistent with this power, the legislature has limited, and/or eliminated, the liability of defendants in certain personal injury cases and has enacted statutes of limitation and repose which can effectively prevent plaintiffs from recovering damages in personal injury cases, there is no logical reason why a statutory limitation on a plaintiff's remedy as imposed by this section is any different than other permissible limitations on the ability of plaintiffs to recover in tort actions. Kirkland ex rel. Kirkland v. Blain County Med. Ctr., 134 Idaho 464, 4 P.3d 1115 (2000).

As a matter of law, the statutory cap in this section is the maximum "value" of a claim for noneconomic damages. State Dep't of Health & Welfare v. Hudelson (In re Hudelson), 146 Idaho 439, 196 P.3d 905 (2008).

Legislative Intent.

This section provides no indication that the legislature was concerned with out-of-court settlements or that these should be taken into consideration when applying the cap: regardless of how many defendants are listed on the verdict form or how many actions the claimant brings to collect damages, ultimately, a judgment cannot be entered in favor of "a claimant" that exceeds the amount of the statutory cap. Horner v. Sani-Top, Inc., 143 Idaho 230, 141 P.3d 1099 (2006).

Willful or Reckless Misconduct.

District court properly denied judgment as a matter of law and submitted the issue of reckless or willful conduct under this section to the jury because conflicting inferences on the issue of foreseeability could be drawn from the facts. Kuntz v. Lamar Corp., 385 F.3d 1177 (9th Cir. 2004).

6-1604. Limitation on punitive damages. — (1) In any action seeking recovery of punitive damages, the claimant must prove, by clear and convincing evidence, oppressive, fraudulent, malicious or outrageous conduct by the party against whom the claim for punitive damages is asserted.

(2) In all civil actions in which punitive damages are permitted, no claim for damages shall be filed containing a prayer for relief seeking punitive

damages. However, a party may, pursuant to a pretrial motion and after hearing before the court, amend the pleadings to include a prayer for relief seeking punitive damages. The court shall allow the motion to amend the pleadings if, after weighing the evidence presented, the court concludes that, the moving party has established at such hearing a reasonable likelihood of proving facts at trial sufficient to support an award of punitive damages. A prayer for relief added pursuant to this section shall not be barred by lapse of time under any applicable limitation on the time in which an action may be brought or claim asserted, if the time prescribed or limited had not expired when the original pleading was filed.

(3) No judgment for punitive damages shall exceed the greater of two hundred fifty thousand dollars ($250,000) or an amount which is three (3) times the compensatory damages contained in such judgment. If a case is tried to a jury, the jury shall not be informed of this limitation. The limitations on noneconomic damages contained in section 6-1603, Idaho Code, are not applicable to punitive damages.

(4) Nothing in this section is intended to change the rules of evidence used by a trier of fact in finding punitive damages.

History.

I.C., § 6-1604, as added by 1987, ch. 278, § 1, p. 571; am. 2003, ch. 122, § 3, p. 370.

STATUTORY NOTES

Compiler's Notes.

Section 5 of S.L. 2003, ch. 122 provides: "Severability. The provisions of this act are hereby declared to be severable and if any provision of this act or the application of such provision to any person or circumstance is declared invalid for any reason, such declaration shall not affect the validity of remaining portions of this act."

Effective Dates.

Section 18 of S.L. 1987, ch. 278, as amended by § 1 of S.L. 1990, ch. 121, read: "The provisions of this act shall take effect on July 1, 1987, provided however, that Section [Sections] 1 through 11 shall apply only to causes of action which accrue on and after July 1, 1987."

Section 6 of S.L. 2003, ch. 122 provides: "This act shall be in full force and effect on and after July 1, 2003. Sections 1 through 3 of this act shall apply to all causes of action which accrue thereafter. Section 4 of this act shall apply to all cases in which an appeal is filed thereafter."

JUDICIAL DECISIONS

Analysis

Award improper.
Basis for award.
Burden of proof.
Determining amount of damages.
Discretion of court.
Failure to strike improper claim.
Federal diversity cases.
Hearing.
No malice found.

Award Improper.

Award of punitive damages was vacated; the award was not appropriate because, while there was fraud, the agreement between the

parties was illegal, and the plaintiffs knew it. Trees v. Kersey, 138 Idaho 3, 56 P.3d 765 (2002).

Basis for Award.

Punitive damages are reserved for the most unusual and compelling circumstances; the reason for the disfavor with regard to awarding punitive damages is the emphasis on punishment and deterrence rather than compensation of plaintiff, which is the normal role for a civil action. O'Neil v. Vasseur, 118 Idaho 257, 796 P.2d 134 (Ct. App. 1990).

As a matter of law, the failure to disclose a subsequently discovered fact, absent a duty to do so, is not such conduct that would support an award of punitive damages under this section. Duffin v. Idaho Crop Imp. Ass'n, 126 Idaho 1002, 895 P.2d 1195 (1995).

Nominal damages to a landowner who was prevented from accessing his property by an easement across a neighbor's property, where the neighbor erected a locked gate across the easement road, supported a punitive damages award because overwhelming evidence showed that the neighbor was aware of the easement. Harwood v. Talbert, 136 Idaho 672, 39 P.3d 612 (2001).

Punitive damage award of $93,498, though a significant portion of defendant's assets, was not excessive in light of defendant's dishonest conduct and its status as a bonded warehouse; the award was not disproportionate to the compensatory damages and could deter similar conduct. Griff, Inc. v. Curry Bean Co., 138 Idaho 315, 63 P.3d 441 (2003).

Court did not abuse its discretion when it denied the individual's motion to amend to add a prayer for punitive damages under subsection (2) because the individual had not established a reasonable likelihood of proving the requisite extremely harmful state of mind. Kuntz v. Lamar Corp., 385 F.3d 1177 (9th Cir. 2004).

In a commercial lease dispute, punitive damages were proper because defendants decided to terminate the lease prior to the expiration, based on circumstances they contrived, and they acted in a manner that was malicious or outrageous. Gunter v. Murphy's Lounge, L.L.C., 141 Idaho 16, 105 P.3d 676 (2005).

Where the member of a limited liability company and an employee wrongfully diverted jobs from the company and used its employees and equipment to perform those jobs, the company filed a claim for tortious interference with prospective economic advantage. The district court abused its discretion in denying the company's motion to amend its pleadings to add claims for punitive damages without conducting the analysis required by this section. Todd v. Sullivan Constr. LLC, 146 Idaho 118, 191 P.3d 196 (2008).

Burden of Proof.

The district judge did not abuse his discretion by denying plaintiff's claim for punitive damages where defendant failed to establish a reasonable likelihood he could prove, by a preponderance of the evidence, that plaintiff acted oppressively, fraudulently, wantonly, maliciously or outrageously. Weaver v. Stafford, 134 Idaho 691, 8 P.3d 1234 (2000), overruled on other grounds, Weitz v. Green, — Idaho —, — P.3d — (April 2, 2010).

Injured customer's motion to add punitive damages was properly granted because the amended complaint put the store on notice of the customer's claim for punitive damages and it sufficiently alleged that the store's failure to train employees in safe display techniques was an extreme deviation from industry practice, which was sufficient to establish a "reasonable likelihood" of proving facts at trial to support a punitive damages award. Vendelin v. Costco Wholesale Corp., 140 Idaho 416, 95 P.3d 34 (2004).

Buyer, who alleged that insulation was defective and that its seller breached an agreement to reimburse the buyer for repairs, met the "reasonable likelihood" standard, and was entitled to amend its complaint to include a claim for punitive damages. A statement by the seller's product manager that the seller didn't care because the insulation business was being sold, the seller's failure to inspect the buildings containing the insulation, and its knowledge of past insulation shrinkage problems elsewhere raised a reasonable inference that the seller was not acting in good faith in withholding reimbursement, but instead was stiffing the buyer while reaping the benefits of the repairs. Hansen-Rice, Inc. v. Celotex Corp., 414 F. Supp. 2d 970 (D. Idaho 2006).

Conduct justifying punitive damages requires an intersection of two factors: a bad act and a bad state of mind. The defendant must (1) act in a manner that was an extreme deviation from reasonable standards of conduct with an understanding of — or disregard for — its likely consequences, and must (2) act with an extremely harmful state of mind, described variously as with malice, oppression, fraud, gross negligence, wantonness, deliberately, or willfully. Adams v. United States, 622 F. Supp. 2d 996 (D. Idaho 2009).

Where herbicide manufacturer's conduct does not demonstrate the harmful state of mind necessary to support an award of punitive damages and plaintiff offered no evidence that changes that the manufacturer made to the label of the herbicide were an extreme deviation from industry standards of conduct, plaintiffs were not entitled to amend their complaint to add a claim for punitive damages. Adams v. United States, 622 F. Supp. 2d 996 (D. Idaho 2009).

Determining Amount of Damages.

Calculating 5% of insurance company's annual profit in arriving at an amount of punitive damages was a reasonable method of determining an appropriate amount for deterrent purposes where facts established deceptive marketing practices and bad faith denial of benefits practices by insurance company which were likely to continue if not deterred. Walston v. Monumental Life Ins. Co., 129 Idaho 211, 923 P.2d 456 (1996).

Discretion of Court.

Where the district court acted consistent with legal standards applicable to punitive damages and reached its decision by an exercise of reason, the court did not abuse its discretion in determining not to allow the jury to consider the plaintiff's claim for punitive damages. Polk v. Robert D. Larrabee Family Home Ctr., 135 Idaho 303, 17 P.3d 247 (2000).

Trial court did not abuse its discretion when it denied the insured and the attorney's motion to amend their complaint to add a claim for punitive damages because the insurer declined their help, it was not even aware of the mediation, and it was not actively pursuing its claim. Seiniger Law Office, P.A. v. North Pacific Ins. Co., 145 Idaho 241, 178 P.3d 606 (2008).

District court did not abuse its discretion in concluding that a reasonable likelihood existed that the evidence could support a punitive damages award; regardless, the issue of whether the evidence could support an award of punitive damages was moot, because the jury in fact awarded punitive damages and their decision was supported by competent and substantial, although conflicting, evidence. Hall v. Farmers Alliance Mut. Ins. Co., 145 Idaho 313, 179 P.3d 276 (2008).

Failure to Strike Improper Claim.

Where plaintiff's complaint contained a prayer for relief seeking punitive damages and defendants never moved to strike such improper claim, by failing to object defendants waived their right to object, and because the issue was fully tried by the parties, the court should have treated the issue as if it had been properly pled and determined whether an award of punitive damages was proper. Mikesell v. Newworld Dev. Corp., 122 Idaho 868, 840 P.2d 1090 (Ct. App. 1992).

Federal Diversity Cases.

Subsection (2) of this section is substantive in nature and, therefore, controlling in federal court in a diversity case. Windsor v. Guarantee Trust Life Ins. Co., 684 F. Supp. 630 (D. Idaho 1988).

Hearing.

Where the district court held a hearing prior to trial and determined that one of the plaintiffs would be allowed to present punitive damages there was no need to hold a new hearing following the court's decision to allow a unified trial. Inland Group of Cos. v. Providence Wash. Ins. Co., 133 Idaho 249, 985 P.2d 674 (1999).

No Malice Found.

Where the district court determined that there was sufficient evidence for a jury to find that the defendant intentionally and willfully breached an exclusivity contract with the plaintiff, but that there was no evidence of malice on their behalf, the court's denial of a motion to amend to add a claim for punitive damages was not an abuse of discretion. General Auto Parts Co. v. Genuine Parts Co., 132 Idaho 849, 979 P.2d 1207 (1999).

From a general partner's attempt to dissociate from an LLP, the district court properly denied the LLP punitive damages under this section from the LLP's wrongful dissociation counterclaim, as there was a lack of evidence of oppressive, fraudulent, malicious or outrageous conduct on the part of the partner. St. Alphonsus Diversified Care, Inc. v. MRI Assocs., LLP, — Idaho —, 224 P.3d 1068 (2009).

Cited in: Doe v. Cutter Biological, 844 F. Supp. 602 (D. Idaho 1994); Mac Tools, Inc. v. Griffin, 126 Idaho 193, 879 P.2d 1126 (1994); Vaught v. Dairyland Ins. Co., 131 Idaho 357, 956 P.2d 674 (1998); McGilvray v. Farmers New World Life Ins. Co., 136 Idaho 39, 28 P.3d 380 (2001); King v. Lang, 136 Idaho 905, 42 P.3d 698 (2002); Wiggins v. Peachtree Settlement Funding, 273 Bankr. 839 (Bankr. D. Idaho 2001).

RESEARCH REFERENCES

A.L.R. — Validity of state statutory cap on punitive damages. 103 A.L.R.5th 379.

Liability of cigarette manufacturers for punitive damages. 108 A.L.R.5th 343.

6-1605. Limitation on liability of volunteers, officers and directors of nonprofit corporations and organizations and trustees of charitable trusts. — (1) In any nonprofit corporation or organization or charitable trust as defined in section 6-1601(6), Idaho Code, officers,

directors, and volunteers who serve the nonprofit corporation or organization without compensation and trustees of the charitable trust who serve without compensation shall be personally immune from civil liability arising out of their conduct as an officer, director, trustee or volunteer, if such conduct is within the course and scope of the duties and functions of the individual officer, director, trustee or volunteer and at the direction of the corporation or organization or charitable trust. The provisions of this section shall not eliminate or limit, and no immunity is hereby granted for the liability of an officer, director, trustee or volunteer:

(a) For conduct which is willful, wanton, or which involves fraud or knowing violation of the law;

(b) To the extent of coverage for such conduct under a policy of liability insurance, whether the policy is purchased by the corporation or organization or charitable trust, the individual officer, director, trustee, volunteer or some third party;

(c) For any intentional breach of a fiduciary duty or duty of loyalty owed by the officer, director or volunteer to the corporation, organization or the members thereof, or owed by the trustee to the charitable trust or the members thereof;

(d) For acts or omissions not in good faith or which involve intentional misconduct, fraud or a knowing violation of law;

(e) For any transaction from which the officer, director, trustee or volunteer derived an improper personal benefit;

(f) For any violation of the provisions of section 30-3-82, Idaho Code; or

(g) For damages which result from the operation of a motor vehicle.

(2) Reimbursement of an officer, director or volunteer of a nonprofit corporation or organization or of a trustee of a charitable trust for costs and expenses actually incurred shall not be considered compensation.

(3) Nothing in this section shall be construed to supersede, abrogate, or limit any immunities or limitation of liability otherwise provided by law.

History.

I.C., § 6-1605, as added by 1987, ch. 278, § 1, p. 571; am. 1990, ch. 105, § 2, p. 211; am. 2003, ch. 59, § 1, p. 205; am. 2008, ch. 83, § 2, p. 214.

STATUTORY NOTES

Amendments.

The 2008 amendment, by ch. 83, in the section catchline, added "and trustees of charitable trusts"; throughout the section, inserted "trustee" following "director"; in the introductory paragraph in subsection (1), twice inserted "or charitable trust" and inserted "and trustees of the charitable trust who serve without compensation"; in paragraph (1)(b), inserted "or charitable trust"; in paragraph (1)(c), added "or owed by the trustee to the charitable trust or the members thereof"; and in subsection (2), inserted "or of a trustee of a charitable trust."

Compiler's Notes.

Section 19 of S.L. 1987, ch. 278 read: "The provisions of this act are hereby declared to be severable and if any provision of this act or the application of such provision to any person or circumstance is declared invalid for any reason, such declaration shall not affect the validity of remaining portions of this act."

Effective Dates.

Section 18 of S.L. 1987, ch. 278, as amended by § 1 of S.L. 1990, ch. 121, read: "The provisions of this act shall take effect on July 1, 1987, provided however, that Section [Sections] 1 through 11 shall apply only to causes of action which accrue on and after July 1, 1987."

6-1606. Prohibiting double recoveries from collateral sources. — In any action for personal injury or property damage, a judgment may be entered for the claimant only for damages which exceed amounts received by the claimant from collateral sources as compensation for the personal injury or property damage, whether from private, group or governmental sources, and whether contributory or noncontributory. For the purposes of this section, collateral sources shall not include benefits paid under federal programs which by law must seek subrogation, death benefits paid under life insurance contracts, benefits paid by a service corporation organized under chapter 34, title 41, Idaho Code, and benefits paid which are recoverable under subrogation rights created under Idaho law or by contract. Evidence of payment by collateral sources is admissible to the court after the finder of fact has rendered an award. Such award shall be reduced by the court to the extent the award includes compensation for damages which have been compensated independently from collateral sources.

History.
I.C., § 6-1606, as added by 1990, ch. 131, § 1, p. 304.

JUDICIAL DECISIONS

Analysis

Amounts paid by defendant.
Attorney's fees.
Insurance payments.
Medicare write-offs.
Offset not appropriate.

Amounts Paid by Defendant.

In plaintiff's action to recover damages for personal injuries following a car accident, the district court correctly refused to allow defendant to present evidence to the jury regarding the amounts actually paid to plaintiff's medical providers. Dyet v. McKinley, 139 Idaho 526, 81 P.3d 1236 (2003).

Attorney's Fees.

In action alleging breach in agreement concerning sale of plaintiff's share of stock in corporation founded by plaintiff and defendant, to defendant, contrary to plaintiff's argument that defendant was not entitled to attorney's fees since she did not incur any liability as corporation incurred the liability for her attorney's fees and to award them to her would result in a windfall to her; the collateral source rule found in this section was inapplicable and further, any arrangement defendant may have made with a third party regarding her attorney's fees was not relevant to the question of whether she, as a party, is entitled to be compensated for attorney's fees incurred in defending against the complaint. Hines v. Hines, 129 Idaho 847, 934 P.2d 20 (1997).

Insurance Payments.

In plaintiff's personal injury suit for damages following an automobile accident, defendant was not entitled to have plaintiff's jury award reduced by the amount of payments plaintiff received from her insurance company in underinsured motorist benefits. This section provides that collateral sources shall not include benefits paid which are recoverable under subrogation rights under Idaho law or by contract. Whether or not the insurance company seeks recovery from plaintiff as it is entitled under the insurance policy is a contractual matter between plaintiff and the insurance company. Dyet v. McKinley, 139 Idaho 526, 81 P.3d 1236 (2003).

Medicare Write-Offs.

In plaintiff's action to recover damages for personal injuries from a car accident, the district court correctly determined that evidence of Medicare write-offs was inadmissible. By treating a Medicare write-off as a collateral source, the danger of prejudice is avoided, and the jury will not be influenced by the existence of Medicare. Dyet v. McKinley, 139 Idaho 526, 81 P.3d 1236 (2003).

Trial court erred in denying defendant's

motion to have plaintiff's Medicare "write-downs" treated as a collateral source. Slack v. Kelleher, 140 Idaho 916, 104 P.3d 958 (2004).

Offset Not Appropriate.

Trial court did not err in holding that payments for medical and funeral expenses were simply part of a store's settlement and, therefore, the judgment against the manufacturer in a wrongful death action should not have been offset by the amount of those payments. Horner v. Sani-Top, Inc., 143 Idaho 230, 141 P.3d 1099 (2006).

Cited in: Walker v. American Cyanamid Co., 130 Idaho 824, 948 P.2d 1123 (1997); Van Brunt v. Stoddard, 136 Idaho 681, 39 P.3d 621 (2001).

6-1607. Employer liability for employee torts. — (1) No employer shall be directly or indirectly liable in tort based upon an employer/employee relationship for any act or omission of an employee which occurs after the termination of the employee's employment unless it is shown by clear and convincing evidence that the acts or omissions of the employer itself constitute gross negligence or reckless, willful and wanton conduct as those standards are defined in section 6-904C, Idaho Code, and were a proximate cause of the damage sustained.

(2) There shall be a presumption that an employer is not liable in tort based upon an employer/employee relationship for any act or omission of a current employee unless the employee was wholly or partially engaged in the employer's business, reasonably appeared to be engaged in the employer's business, was on the employer's premises when the allegedly tortious act or omission of the employee occurred, or was otherwise under the direction or control of the employer when the act or omission occurred. This presumption may be rebutted only by clear and convincing evidence that the employer's acts or omissions constituted gross negligence or, reckless, willful and wanton conduct as those standards are defined in section 6-904C, Idaho Code, and were a proximate cause of the damage sustained.

(3) In every civil action to which this section applies, an employer shall have the right (pursuant to pretrial motion and after opportunity for discovery) to a hearing before the court in which the person asserting a claim against an employer must establish a reasonable likelihood of proving facts at trial sufficient to support a finding that liability for damages should be apportioned to the employer under the standards set forth in this section. If the court finds that this standard is not met, the claim against the employer shall be dismissed and the employer shall not be included on a special verdict form.

(4) Nothing in this section shall be construed to expand any rights of recovery under the common law or to limit any person's rights under any other statute including, but not limited to, chapter 59, title 67, Idaho Code, and title 72, Idaho Code.

History.

I.C., § 6-1607, as added by 2000, ch. 210, § 2, p. 536.

STATUTORY NOTES

Compiler's Notes.

The words in parentheses in subsection (3) so appeared in the law as enacted.

CHAPTER 17

TORT ACTIONS IN CHILD ABUSE CASES

6-1701. Tort actions in child abuse cases. — (1) An action may be brought by or on behalf of any child against any person who has:

(a) Willfully and lewdly committed any lewd or lascivious act or acts upon or with the body or any part or member of a child under the age of sixteen (16) years as defined in section 18-1508, Idaho Code; or

(b) Sexually abused any child as defined in section 18-1506, Idaho Code; or

(c) Sexually exploited any child for a commercial purpose as defined in section 18-1507, Idaho Code; or

(d) Injured a child as defined in section 18-1501, Idaho Code.

(2) If an act prohibited under subsection (1) of this section involves employment-related circumstances as provided under section 6-1607(2), Idaho Code, then an action may be brought under the common law by, or on behalf of, any child against the employer of the person who committed the act, subject to the requirements of section 6-1607, Idaho Code.

(3) The civil causes of action provided for in this section exist independently of any criminal action commenced pursuant to chapter 15, title 18, Idaho Code. A civil action may be pursued under the provisions of this chapter even if a criminal prosecution is not pursued.

History.
I.C., § 6-1701, as added by 1989, ch. 47, § 1, p. 60; am. 2007, ch. 125, § 1, p. 375.

STATUTORY NOTES

Amendments.
The 2007 amendment, by ch. 125, designated the formerly undesignated introductory paragraph as subsection (1), and made related redesignations; added subsection (2); and designated the last formerly undesignated paragraph as subsection (3) and substituted "The civil causes of action provided for in this section" for "This civil cause of action."

JUDICIAL DECISIONS

ANALYSIS

Limitation of actions.
Negligence.
Vicarious liability.

Limitation of Actions.
In a suit by former boy scouts against Boy Scouts of American (BSA) for damages resulting from their abuse by their former scout leader, the BSA's motion to dismiss should have been granted. Liability imposed under this chapter differed significantly from that formerly available. The chapter could not be applied to conduct that occurred at least six years before it was enacted, and BSA could not be held accountable for behavior that was not actionable at the time it occurred. Doe v.

BSA, — Idaho —, 224 P.3d 494 (2009).

Negligence.

This statute sets forth intentional torts only and does not give rise to any actions in negligence or negligence per se. Steed v. Grand Teton Council of the BSA, Inc., 144 Idaho 848, 172 P.3d 1123 (2007) (decided prior to 2007 amendment).

Vicarious Liability.

Although this statute does not create vicarious liability, an employer can can be found liable for willfully permitting injury to a child, even if the employer did not actually harm the child directly. Steed v. Grand Teton Council of the BSA, Inc., 144 Idaho 848, 172 P.3d 1123 (2007).

Cited in: Doe ex rel. Rudy-Glanzer v. Glanzer, 232 F.3d 1258 (9th Cir. 2000).

6-1702. Who may bring action. — A child abuse tort action under the provisions of this chapter may be brought by the child or on the child's behalf by a parent or the child's legal representative.

History.

I.C., § 6-1702, as added by 1989, ch. 47, § 1, p. 60.

6-1703. Damages—Attorneys' fees. — Damages in an action brought pursuant to the provisions of this chapter shall consist of compensation for past and future damages and may consist of emotional and physical pain and suffering, mental anguish, disability, loss of society and companionship, expenses for past and future therapy, and punitive damages where the claimant proves malicious or outrageous conduct by the party against whom the claim for punitive damages is asserted.

The prevailing party in a child abuse tort action shall be entitled to costs and reasonable attorneys' fees.

History.

I.C., § 6-1703, as added by 1989, ch. 47, § 1, p. 60.

6-1704. Statute of limitations. — (1) Notwithstanding any limitation contained in chapter 2, title 5, Idaho Code, an action under the provisions of this chapter must be commenced within five (5) years from the date that an aggrieved child reaches the age of eighteen (18) years or, after the child reaches the age of eighteen (18) years, within five (5) years of the time the child discovers or reasonably should have discovered the act, abuse or exploitation and its causal relationship to an injury or condition suffered by the child, whichever occurs later.

(2) The child need not establish which act in a series of continuing acts, abuse or exploitation caused the injury complained of, but may compute the date of discovery from the date of discovery of the last act by the same perpetrator which is part of a common scheme or plan.

(3) The knowledge of a custodial parent or guardian shall not be imputed to a child under the age of eighteen (18) years.

History.

I.C., § 6-1704, as added by 1989, ch. 47, § 1, p. 60; am. 2007, ch. 125, § 2, p. 375.

STATUTORY NOTES

Amendments.
The 2007 amendment, by ch. 125, added the subsection (1) designation and the language beginning "or, after the child reaches the age of eighteen (18) years" therein; and added subsections (2) and (3).

JUDICIAL DECISIONS

Applicability.
Section 6-906A of the Idaho Tort Claims Act, not this section, applied to a sexual abuse claim brought by a minor against a school district and teacher. Osborn v. Salinas, 131 Idaho 456, 958 P.2d 1142 (1998).

Minor's claim involving sexual abuse against a school district, brought pursuant to 42 U.S.C.S. § 1983, was subject to the two-year limitations period under § 5-219(4), not this section. Osborn v. Salinas, 131 Idaho 456, 958 P.2d 1142 (1998).

6-1705. Effective date. — This act shall be in full force and effect on and after July 1, 1989. Provided, that an action may be brought under this chapter only if the cause of action accrued on or after July 1, 1989. Provided further, that nothing in this chapter is intended to affect or limit causes of action for damages or other relief recognized by common law or other statutory provisions for events that occurred before July 1, 1989.

History.
I.C., § 6-1705, as added by 1989, ch. 47, § 1, p. 60.

STATUTORY NOTES

Compiler's Notes.
The words "this act" refer to S.L. 1989, ch. 47, which is compiled as §§ 6-1701 to 6-1705.

CHAPTER 18

EQUINE ACTIVITIES IMMUNITY ACT

SECTION.

6-1801. Definitions. — As used in this chapter:

(1) "Engages in an equine activity" means a person who rides, trains, drives or is a passenger upon an equine, whether mounted or unmounted, and does not mean a spectator at an equine activity or a person who participates in the equine activity but does not ride, train, drive or ride as a passenger upon an equine.

(2) "Equine" means a horse, pony, mule, donkey or hinny.

(3) "Equine activity" means:

(a) Equine shows, fairs, competitions, performances or parades that involve any or all breeds of equines and any of the equine disciplines including, but not limited to, dressage, hunter and jumper horse shows, grand prix jumping, three (3) day events, combined training, rodeos,

driving, pulling, cutting, polo, steeplechasing, endurance trail riding and western games, and hunting;

(b) Equine training and/or teaching activities;

(c) Boarding equines;

(d) Riding, inspecting or evaluating an equine belonging to another whether or not the owner has received some monetary consideration or other thing of value for the use of the equine or is permitting a prospective purchaser of the equine to ride, inspect or evaluate the equine; and

(e) Rides, trips, hunts or other equine activities of any type however informal or impromptu that are sponsored by an equine activity sponsor.

(4) "Equine activity sponsor" means an individual, group or club, partnership or corporation, whether or not the sponsor is operating for profit or nonprofit, which sponsors, organizes or provides the facilities for an equine activity including, but not limited to, pony clubs, 4-H clubs, hunt clubs, riding clubs, school and college sponsored classes and programs, therapeutic riding programs, and operators, instructors and promoters of equine facilities including, but not limited to, stables, clubhouses, ponyride strings, fairs and arenas at which the activity is held.

(5) "Equine professional" means a person engaged for compensation in:

(a) Instructing a participant or renting to a participant an equine for the purpose of riding, driving or being a passenger upon the equine; or

(b) Renting equipment or tack to a participant.

(6) "Participant" means any person, whether amateur or professional, who directly engages in an equine activity, whether or not a fee is paid to participate in the equine activity.

History.
I.C., § 6-1801, as added by 1990, ch. 40, § 1, p. 61.

6-1802. Limitation of liability on equine activities. — (1) Except as provided in subsections (2) and (3) of this section, an equine activity sponsor or an equine professional shall not be liable for any injury to or the death of a participant or equine engaged in an equine activity and, except as provided in subsections (2) and (3) of this section, no participant nor participant's representative may maintain an action against or recover from an equine activity sponsor or an equine professional for an injury to or the death of a participant or equine engaged in an equine activity.

(2) The provisions of this chapter do not apply to the horse or mule racing industry as regulated in chapter 25, title 54, Idaho Code.

(3) Nothing in subsection (1) of this section shall prevent or limit the liability of an equine activity sponsor or an equine professional:

(a) If the equine activity sponsor or the equine professional:

(i) Provided the equipment or tack and the equipment or tack caused the injury; or

(ii) Provided the equine and failed to make reasonable and prudent efforts to determine the ability of the participant to engage safely in the equine activity, determine the ability of the equine to behave safely with

the participant, and to determine the ability of the participant to safely manage the particular equine;

(iii) Owns, leases, rents or otherwise is in lawful possession and control of the land or facilities upon which the participant or equine sustained injuries because of a dangerous latent condition which was known to or should have been known to the equine activity sponsor or the equine professional and for which warning signs have not been conspicuously posted;

(iv) Commits an act or omission that constitutes willful or wanton disregard for the safety of the participant or equine and that act or omission caused the injury;

(v) Intentionally injures the participant or equine;

(b) Under liability provisions as set forth in the products liability laws; or

(c) Under the liability provisions set forth in chapter 9, title 6, Idaho Code.

History.
I.C., § 6-1802, as added by 1990, ch. 40, § 1, p. 61; am. 1998, ch. 296, § 1, p. 978.

STATUTORY NOTES

Compiler's Notes.
Section 2 of S.L. 1990, ch. 40 read: "The provisions of this act apply only to causes of action filed on or after July 1, 1990."

CHAPTER 19

LIMITATION OF A MENTAL HEALTH PROFESSIONAL'S DUTY TO WARN

6-1901. Mental health professional defined. — As used in this chapter "mental health professional" means:

(1) A physician licensed pursuant to chapter 18, title 54, Idaho Code;

(2) A professional counselor licensed pursuant to chapter 34, title 54, Idaho Code;

(3) A psychologist licensed pursuant to chapter 23, title 54, Idaho Code;

(4) A social worker licensed pursuant to chapter 32, title 54, Idaho Code; or

(5) A licensed professional nurse licensed pursuant to chapter 14, title 54, Idaho Code.

History.
I.C., § 6-1901, as added by 1991, ch. 235, § 1, p. 565.

6-1902. A mental health professional's duty to warn. — A mental health professional has a duty to warn a victim if a patient has communi-

cated to the mental health professional an explicit threat of imminent serious physical harm or death to a clearly identified or identifiable victim or victims, and the patient has the apparent intent and ability to carry out such a threat.

History.
I.C., § 6-1902, as added by 1991, ch. 235, § 1, p. 565.

6-1903. Discharge of a mental health professional's duty to warn. — (1) The duty to warn arises only under the limited circumstances specified in section 6-1902, Idaho Code. The duty to warn a clearly identifiable victim shall be discharged when the mental health professional has made a reasonable effort to communicate, in a reasonable timely manner, the threat to the victim and has notified the law enforcement agency closest to the patient's or victim's residence of the threat of violence, and has supplied a requesting law enforcement agency with any information he has concerning the threat of violence. If the victim is a minor, in addition to notifying the appropriate law enforcement agency as required in this subsection, the mental health professional shall make a reasonable effort to communicate the threat to the victim's custodial parent, noncustodial parent, or legal guardian.

(2) The provisions of this section do not limit or affect the mental health professional's duty to report child abuse or neglect in accordance with section 16-1605, Idaho Code.

History.
I.C., § 6-1903, as added by 1991, ch. 235, § 1, p. 565; am. 2005, ch. 391, § 2, p. 1263.

6-1904. Immunity from liability. — (1) No professional disciplinary procedure, no monetary liability and no cause of action may arise against any mental health care professional for failure to predict or take precautions to provide protection from a patient's violent behavior, other than the duty to warn provided in section 6-1902, Idaho Code, unless the mental health care professional failed to exercise that reasonable degree of skill, knowledge, and care ordinarily possessed and exercised by members of his professional specialty under similar circumstances.

(2) No professional disciplinary procedure, no monetary liability and no cause of action may arise against any mental health professional, who has a reasonable basis for believing that he has a duty to warn pursuant to section 6-1902, Idaho Code, for disclosing confidential or privileged information in an effort to discharge such duty.

(3) The provisions of this section do not modify any duty to take precautions to prevent harm by a patient that may arise if the patient is within the custodial responsibility of a hospital or other facility or is being discharged therefrom.

(4) Except as provided in section 6-1902, Idaho Code, the provisions of this section do not modify the provisions of sections 6-1001 through 6-1013, Idaho Code.

History.
I.C., § 6-1904, as added by 1991, ch. 235, § 1, p. 565; am. 2010, ch. 79, § 1, p. 133.

STATUTORY NOTES

Amendments.
The 2010 amendment, by ch. 79, corrected the section reference in subsection (2).

CHAPTER 20

DISPARAGEMENT OF AGRICULTURAL FOOD PRODUCTS

SECTION.

6-2001. Legislative intent. — The legislature hereby finds, determines and declares that the production of agricultural food products constitutes a large proportion of the Idaho economy and that it is beneficial to the citizens of this state to protect the vitality of the agricultural economy by providing a legal cause of action for producers of perishable agricultural food products to recover damages for the disparagement of any perishable agricultural food product.

History.
I.C., § 6-2001, as added by 1992, ch. 252, § 1, p. 736.

6-2002. Definitions. — As used in this chapter:

(1) "Disparagement" means the publication to a third party of a false factual statement; and

(a) The published statement is of and concerning the plaintiff's specific perishable agricultural food product;

(b) The statement clearly impugns the safety of the product;

(c) The defendant intended the publication to cause harm to the plaintiff's pecuniary interest, or either recognized or reasonably should have recognized that it was likely to do so;

(d) The defendant made the statement with actual malice, that is, he knew that the statement was false or acted in reckless disregard of its truth or falsity; and

(e) The statement does in fact cause the plaintiff pecuniary loss.

(2) "Perishable agricultural food product" means an agricultural product as defined in section 22-2602, Idaho Code, intended for human consumption which is sold or distributed in a form that will perish or decay beyond marketability within a period of time.

History.
I.C., § 6-2002, as added by 1992, ch. 252, § 1, p. 736; am. 2001, ch. 20, § 1, p. 26.

6-2003. Disparagement of perishable agricultural food products — Right of action for damages. — (1) A producer of perishable agricultural food products who suffers actual damages as a result of another person's disparagement of the producer's product may bring an action for actual damages in a court of competent jurisdiction.

(2) The plaintiff shall bear the burden of proof and persuasion as to each element of the cause of action and must prove each element by clear and convincing evidence.

(3) The plaintiff may only recover actual pecuniary damages. Neither presumed nor punitive damages shall be allowed.

(4) The disparaging factual statement must be clearly directed at a particular plaintiff's product. A factual statement regarding a generic group of products, as opposed to a specific producer's product, shall not serve as the basis for a cause of action.

(5) Notwithstanding any limitation contained in chapter 2, title 5, Idaho Code, an action under the provisions of this chapter must be commenced within two (2) years after the cause of action accrues and not thereafter.

(6) This statutory cause of action is not intended to abrogate the common law action for product disparagement or any other cause of action otherwise available.

History.
I.C., § 6-2003, as added by 1992, ch. 252, § 1, p. 736.

STATUTORY NOTES

Effective Dates.
Section 2 of S.L. 1992, ch. 252 read: "This act shall be in full force and effect on and after July 1, 1992, and shall apply to acts occurring on and after July 1, 1992."

CHAPTER 21

PROTECTION OF PUBLIC EMPLOYEES

6-2101. Legislative intent. — The legislature hereby finds, determines and declares that government constitutes a large proportion of the Idaho work force and that it is beneficial to the citizens of this state to protect the

integrity of government by providing a legal cause of action for public employees who experience adverse action from their employer as a result of reporting waste and violations of a law, rule or regulation.

History.
I.C., § 6-2101, as added by 1994, ch. 100, § 1, p. 226.

STATUTORY NOTES

Effective Dates.
Section 2 of S.L. 1994, ch. 100 provided the act shall be in full force and effect on and after July 1, 1994, and shall apply to acts occurring on or after July 1. 1994.

JUDICIAL DECISIONS

Protected Activities.
Grant of summary judgment in favor of the employer in the employee's wrongful termination action was proper where his actions were not protected under the Idaho Protection of Public Employees Act, § 6-2101 et seq. Mallonee v. State, 139 Idaho 615, 84 P.3d 551 (2004).

RESEARCH REFERENCES

A.L.R. — Who are "public employers" or "public employees" within the meaning of state whistleblower protection acts. 90 A.L.R.5th 687.

6-2102. Short title. — This act is known as the "Idaho Protection of Public Employees Act."

History.
I.C., § 6-2102, as added by 1994, ch. 100, § 1, p. 226.

STATUTORY NOTES

Compiler's Notes.
The words "this act" refer to S.L. 1994, ch. 100, which is compiled as § 6-2101 et seq.

6-2103. Definitions. — As used in this chapter:

(1) "Adverse action" means to discharge, threaten or otherwise discriminate against an employee in any manner that affects the employee's employment, including compensation, terms, conditions, location, rights, immunities, promotions or privileges.

(2) "Communicate" means a verbal or written report.

(3) "Employee" means a person who performs a service for wages or other remuneration.

(4)(a) "Employer" means the state of Idaho, or any political subdivision or governmental entity eligible to participate in the public employees retirement system, chapter 13, title 59, Idaho Code;

(b) "Employer" includes an agent of an employer.

(5) "Public body" means any of the following:

(a) A state officer, employee, agency, department, division, bureau, board, commission, council, authority, educational institution or any other body in the executive branch of state government;
(b) An agency, board, commission, council, institution member or employee of the legislative branch of state government;
(c) A county, city, town, regional governing body, council, school district, special district, municipal corporation, other political subdivision, board, department, commission, council, agency or any member or employee of them;
(d) Any other body that is created by state or local authority, or any member or employee of that body;
(e) A law enforcement agency or any member or employee of a law enforcement agency; and
(f) The judiciary and any member or employee of the judiciary.

History.
I.C., § 6-2103, as added by 1994, ch. 100, § 1, p. 226.

RESEARCH REFERENCES

A.L.R. — Who are "public employers" or "public employees" within the meaning of state whistleblower protection acts. 90 A.L.R.5th 687.

6-2104. Reporting of governmental waste or violation of law — Employer action. —

(1)(a) An employer may not take adverse action against an employee because the employee, or a person authorized to act on behalf of the employee, communicates in good faith the existence of any waste of public funds, property or manpower, or a violation or suspected violation of a law, rule or regulation adopted under the law of this state, a political subdivision of this state or the United States. Such communication shall be made at a time and in a manner which gives the employer reasonable opportunity to correct the waste or violation.
(b) For purposes of subsection (1)(a) of this section, an employee communicates in good faith if there is a reasonable basis in fact for the communication. Good faith is lacking where the employee knew or reasonably ought to have known that the report is malicious, false or frivolous.
(2) An employer may not take adverse action against an employee because an employee participates or gives information in an investigation, hearing, court proceeding, legislative or other inquiry, or other form of administrative review.
(3) An employer may not take adverse action against an employee because the employee has objected to or refused to carry out a directive that the employee reasonably believes violates a law or a rule or regulation adopted under the authority of the laws of this state, political subdivision of this state or the United States.
(4) An employer may not implement rules or policies that unreasonably restrict an employee's ability to document the existence of any waste of

public funds, property or manpower, or a violation, or suspected violation of any laws, rules or regulations.

History.
I.C., § 6-2104, as added by 1994, ch. 100, § 1, p. 226.

JUDICIAL DECISIONS

Protected Activities.
Grant of summary judgment in favor of the employer in the employee's wrongful termination action was proper where his actions were not protected under the Idaho Protection of Public Employees Act, § 6-2101 et seq. Mallonee v. State, 139 Idaho 615, 84 P.3d 551 (2004).

Claimant presented a prima facie case of retaliatory discharge, because the close relation in time between the discovery of the claimant's documentation of her coworkers' waste and her termination supported the reasonable inference that the claimant was discharged for that documentation. Curlee v. Kootenai County Fire & Rescue, 224 P.3d 458 (October 16, 2008).

6-2105. Remedies for employee bringing action — Proof required. — (1) As used in this section, "damages" means damages for injury or loss caused by each violation of this chapter, and includes court costs and reasonable attorneys' fees.

(2) An employee who alleges a violation of this chapter may bring a civil action for appropriate injunctive relief or actual damages, or both, within one hundred eighty (180) days after the occurrence of the alleged violation of this chapter.

(3) An action begun under this section may be brought in the district court for the county where the alleged violation occurred, the county where the complainant resides, or the county where the person against whom the civil complaint is filed resides or has his principal place of business.

(4) To prevail in an action brought under the authority of this section, the employee shall establish, by a preponderance of the evidence, that the employee has suffered an adverse action because the employee, or a person acting on his behalf engaged or intended to engage in an activity protected under section 6-2104, Idaho Code.

History.
I.C., § 6-2105, as added by 1994, ch. 100, § 1, p. 226.

JUDICIAL DECISIONS

ANALYSIS

Notice requirement.
Prima facie case.

Notice Requirement.
A whistleblower claim is purely a statutory remedy against governmental employers, and there is no reason to assume that the legislature intended those alleging claims under the statute to have to comply with the notice provision of the Idaho Tort Claims Act, § 6-906. Van v. Portneuf Med. Ctr., 147 Idaho 552, 212 P.3d 982 (2009).

Prima Facie Case.
Claimant presented a prima facie case of retaliatory discharge, because the close relation in time between the discovery of the

claimant's documentation of her coworkers' waste and her termination supported the reasonable inference that the claimant was discharged for that documentation. Curlee v. Kootenai County Fire & Rescue, 224 P.3d 458 (October 16, 2008).

6-2106. Court orders for violation of chapter. — A court, in rendering a judgment brought under this chapter, may order any or all of the following:

(1) An injunction to restrain continued violation of the provisions of this act;

(2) The reinstatement of the employee to the same position held before the adverse action, or to an equivalent position;

(3) The reinstatement of full fringe benefits and seniority rights;

(4) The compensation for lost wages, benefits and other remuneration;

(5) The payment by the employer of reasonable costs and attorneys' fees;

(6) An assessment of a civil fine of not more than five hundred dollars ($500), which shall be submitted to the state treasurer for deposit in the general fund.

History.
I.C., § 6-2106, as added by 1994, ch. 100, § 1, p. 226.

STATUTORY NOTES

Compiler's Notes.
The words "this act" refer to S.L. 1994, ch. 100 which is compiled as § 6-2101 et seq.

JUDICIAL DECISIONS

Attorney Fees.
Award of attorney fees to the employee with adjustments was proper where there was no need for two attorneys to represent the employee and the court awarded substantially less than the claimed fees for one of the two attorneys. Smith v. Mitton, 140 Idaho 893, 104 P.3d 367 (2004).

6-2107. Award of attorneys' fees and costs to employer — Action without basis in law or fact. — A court may also order that reasonable attorneys' fees and court costs be awarded to an employer if the court determines that an action brought by an employee under this chapter is without basis in law or in fact. However, an employee shall not be assessed attorneys' fees under this section if, after exercising reasonable and diligent efforts after filing a suit, the employee files a voluntary dismissal concerning the employer, within a reasonable time after determining that the employer would not be liable for damages.

History.
I.C., § 6-2107, as added by 1994, ch. 100, § 1, p. 226.

6-2108. No impairment of employee rights under collective bargaining agreement — Confidentiality protected. — This chapter shall not be construed to diminish or impair the rights of an employee under any collective bargaining agreement, nor to permit disclosures which would

diminish or impair the rights of any person to the continued protection of confidentiality of communications where statute or common law provides such protection.

History.
I.C., § 6-2108, as added by 1994, ch. 100, § 1, p. 226.

6-2109. Notice of employee protection. — An employer shall use appropriate means to notify its employees of their protection and obligation under this chapter.

History.
I.C., § 6-2109, as added by 1994, ch. 100, § 1, p. 226.

CHAPTER 22

CONSTITUTIONALLY BASED EDUCATIONAL CLAIMS ACT

SECTION.

6-2201. Short title. — This chapter shall be known and may be cited as the "Constitutionally Based Educational Claims Act."

History.
I.C., § 6-2201, as added by 1996, ch. 258, § 1, p. 845.

JUDICIAL DECISIONS

Cited in: Osmunson v. State, 135 Idaho 292, 17 P.3d 236 (2000).

6-2202. Purpose of chapter — Definition of constitutionally based educational claim. — Section 1, article IX, of the constitution of the state of Idaho provides: "The stability of a republican form of government depending mainly upon the intelligence of the people, it shall be the duty of the legislature of Idaho, to establish and maintain a general, uniform and thorough system of public, free common schools." The purpose of this chapter is to provide a mechanism for adjudicating the performance of that

duty when there are allegations that public schools do not provide educational services that they are required to provide as part of a general, uniform and thorough system of public, free common schools. In this chapter, a constitutionally based educational claim is defined as a claim that public schools are not providing educational services that they are required to provide under section 1, article IX, of the constitution of the state of Idaho, and constitutionally required educational services are defined as the educational services that must be provided under section 1, article IX, of the constitution of the state of Idaho. In particular, this chapter provides procedures for adjudicating constitutionally based educational claims and administrative and judicial remedies to be implemented when public schools in a specific local school district are not providing constitutionally required educational services as part of a general, uniform and thorough system of public, free common schools that has been established by the legislature. It is the policy of this chapter whenever possible that constitutionally based educational claims shall be settled locally through consent agreements or plans proposed by local school districts and that state intervention in local school districts be a last resort.

History.
I.C., § 6-2202, as added by 1996, ch. 258, § 1, p. 845.

6-2203. System established under section 1, article IX. — The legislature hereby declares that the statutes allowing the creation of or chartering local school districts and giving them authority to raise and spend moneys and to provide educational services are designed to establish and maintain a general, uniform and thorough system of public, free common schools. The legislature hereby declares that the public schools operated by and the educational services provided by local school districts, together with any public schools operated by the state, constitute the system of public, free common schools described in section 1, article IX of the constitution of the state of Idaho.

History.
I.C., § 6-2203, as added by 1996, ch. 258, § 1, p. 845.

JUDICIAL DECISIONS

In General.
The legislature has chosen to fulfill its constitutional obligation by the establishment of local school districts to provide educational services and by granting the school districts the authority to raise and spend money for that purpose, and it is not unreasonable for the legislature to also declare that allegations that the required educational services are not being furnished under the Constitutionally Based Education Claims Act should first be addressed to the local school districts which have been given the responsibility and authority to provide those services. Osmunson v. State, 135 Idaho 292, 17 P.3d 236 (2000).

6-2204. Responsibility for providing educational services required by the constitution. — The legislature has established a system of public, free common schools by its authorization of the creation of or

chartering of local school districts. Local school districts are hereby declared to have the primary responsibility for provision of constitutionally required educational services and for assuring themselves and the public that the local school districts are operating their schools as part of a general, uniform and thorough system of public, free common schools. When a local school district is unable to meet its responsibilities under this chapter because it does not provide constitutionally required educational services, this chapter provides judicial and administrative remedies to bring schools operated by the local school district into compliance with section 1, article IX, of the constitution of the state of Idaho and first prescribes local solutions where possible.

History.
I.C., § 6-2204, as added by 1996, ch. 258, § 1, p. 845.

6-2205. Right of action — Standing to sue. — (1) Patron suits against local school districts. Any person who is a schoolchild, the parent or guardian of a schoolchild, or the parent or guardian of a child who will enter public school in the next two (2) years has standing to sue and may bring suit against the local school district in which the schoolchild or potential schoolchild resides on the ground that the local school district is not providing constitutionally required educational services. These complaints may be known as patron complaints, and the persons who are plaintiffs may be known as patrons. The patron complaint must list with specificity the manner in which the patrons contend that the local school district is not providing constitutionally required educational services. No other person, except the state as parens patriae, has standing to bring suit against a school district on the ground that the school district is not providing constitutionally required educational services.

(2) Parens patriae suit against districts. The state of Idaho, through the legislature or through the superintendent of public instruction, may bring suit against a school district on the ground that the school district is not providing constitutionally required educational services.

(3) Patron suits against the state. No person other than a patron authorized to bring suit against a school district under subsection (1) of this section has standing to bring suit against the state, the legislature, or any of the state's officers or agencies on the ground that the state has not established and maintained a general, uniform and thorough system of public, free common schools. No patron with standing to bring suit against a school district may bring suit against the state, the legislature, or any of the state's officers or agencies on the ground that the state has not established and maintained a general, uniform and thorough system of public, free common schools unless the patron has first brought suit against its local school district pursuant to subsection (1) of this section and the district court has later authorized the patron to add the state as a defendant as authorized by this section. Any patron suit against the state, the legislature, or any of the state's officers or agencies not authorized by the district court pursuant to this section shall be dismissed.

(4) No other suits recognized. School districts are agents of the state for purposes of providing a general, uniform and thorough system of public, free common schools, and they have no standing to bring suit against the state for failure to establish and maintain a general, uniform and thorough system of public, free common schools. Any suit brought by a school district against the state, the legislature, or any of the state's officers or agents contending that the state has not established a general, uniform and thorough system of public, free common schools shall be dismissed. There shall be no right of action by any person contending that there is not a general, thorough and uniform system of free common schools in this state except those authorized in subsections (1), (2) and (3) of this section naming with specificity the local school districts in which the plaintiffs live and with specificity the manner in which they contend that the public schools in that district are not providing constitutionally required educational services. Any other suit contending that there is not a general, thorough and uniform system of free, common schools shall be dismissed.

History.
I.C., § 6-2205, as added by 1996, ch. 258, § 1, p. 845.

STATUTORY NOTES

Cross References.
Superintendent of public instruction, § 67-1501 et seq.

JUDICIAL DECISIONS

Injury.
Because the plaintiffs could not show any palpable injury that was fairly traceable to the prohibition of school district suits under the Constitutionally Based Education Claims Act (CBECA), the plaintiffs had no standing to challenge that aspect of the CBECA. Osmunson v. State, 135 Idaho 292, 17 P.3d 236 (2000).

6-2206. Patron complaints to be forwarded to attorney general. — When a patron complaint is filed against a school district pursuant to this chapter, a copy of the complaint shall also be served on the attorney general, who shall notify the legislature and the superintendent of public instruction that the complaint has been filed. Either the legislature or the superintendent of public instruction may intervene as plaintiffs in the patron suit as a matter of right. No action shall be taken in the patron suit, except for the school district's filing of an answer to the patron complaint, until a copy of the complaint has been forwarded to the attorney general and the legislature and the superintendent of public instruction have been given thirty-five (35) calendar days to decide whether to intervene as a matter of right as plaintiffs in the patron suit.

History.
I.C., § 6-2206, as added by 1996, ch. 258, § 1, p. 845.

STATUTORY NOTES

Cross References.
Superintendent of public instruction, § 67-1501 et seq.

6-2207. Bench trial. — When a complaint is filed against a school district pursuant to this chapter, trial shall be before the district court sitting without a jury.

History.
I.C., § 6-2207, as added by 1996, ch. 258, § 1, p. 845.

6-2208. District court findings. — Upon reaching the merits of the constitutionally based educational claim, the district court shall find whether the defendant local school district is providing all constitutionally required educational services. If the district court shall find that the defendant local school district is providing all constitutionally required educational services, it shall issue a declaratory judgment to that effect. If the district court shall find that the defendant local school district is not providing all constitutionally required educational services, the district court shall then conduct further proceedings as necessary to allow it to make the following findings:

(1) The local school district (a) does or does not offer educational or other services that are not constitutionally required, and (b) does or does not offer the constitutionally required educational services that it does offer in a manner that consumes more of the local school district's resources than necessary to offer the constitutionally required educational services that it does offer.

(2) If the local school district (a) offers educational or other services that are not constitutionally required, or (b) offers some of the services that are constitutionally required in a manner that consumes more of the local school district's resources than necessary to provide the constitutionally required educational services that it does offer, there is or is not a manner that resources devoted to offering services not constitutionally required or that consume more resources than necessary may be redirected to offer services that are constitutionally required but are not being offered. In making this finding, the district court shall take into account any federal mandates with which the local school district must comply, and the local school district shall not be obligated to redirect its resources from complying with federal mandates.

(3) The local school district (a) does or does not impose maintenance and operations tax levies, supplemental maintenance and operations tax levies, and school emergency fund levies up to the statutory maximum allowed by law without holding further elections, and (b) does or does not impose maintenance and operations tax levies, supplemental maintenance and operations tax levies, and school emergency fund levies in a total amount that equals or exceeds the sum of the maximum statutory maintenance and operations levy and maximum statutory emergency fund levy plus the

simple average of all supplemental maintenance and operations levies of all the local school districts in the state. In making this calculation, the district court may take official notice of publications of the superintendent of public instruction or may by order direct the superintendent of public instruction to supply calculations for the district court's use.

History.
I.C., § 6-2208, as added by 1996, ch. 258, § 1, p. 845.

JUDICIAL DECISIONS

Providing Educational Services.
The legislature has chosen to fulfill its constitutional obligation by the establishment of local school districts to provide educational services and by granting the school districts the authority to raise and spend money for that purpose under Article 9, § 1 of the Idaho Constitution, and it is not unreasonable for the legislature to also declare that allegations under the Constitutionally Based Education Claims Act that the required educational services are not being furnished should first be addressed to the local school districts which have been given the responsibility and authority to provide those services. Osmunson v. State, 135 Idaho 292, 17 P.3d 236 (2000).

6-2209. Remedies in suit against district — Continuing jurisdiction. — (1) If the district court finds that the local school district offers educational or other services not federally mandated and not constitutionally required, or offers some of the services that are constitutionally required in a manner that consumes more of the local school district's resources than necessary to provide the constitutionally required services that it does offer, it shall issue an order choosing from among the following remedies and retaining jurisdiction as required by this chapter. Any order accepting or modifying a consent agreement under subsection (2) of this section, accepting or modifying a plan under subsection (3) of this section, or directing school district action under subsection (4) of this section, shall be a final order for purposes of rehearing and appeal, but the filing of an appeal shall not itself stay the effect of the order, and the district court shall have continuing jurisdiction over compliance with the order or stay of the order unless stayed from continuing jurisdiction by the supreme court. The supreme court may stay the order or stay the district court's continuing jurisdiction over compliance with the order on such grounds as it finds appropriate.

(2) The parties shall be given a reasonable time not to exceed thirty-five (35) calendar days to attempt to enter into a consent agreement for meeting the local school district's obligations to provide constitutionally required educational services. If the parties cannot agree on a consent agreement within thirty-five (35) calendar days, the district court shall issue an order under subsection (3) or (4) of this section. If the parties submit a consent agreement, the district court shall independently review the consent agreement and may modify the consent agreement as it finds necessary in light of the local school district's obligations to provide constitutionally required educational services. Following review, the district court shall enter an order accepting, modifying or rejecting the consent agreement and retaining jurisdiction over the case. If the district court rejects the consent agreement,

it shall issue an order under subsection (3) or (4) of this section. An order accepting or modifying the consent agreement may require the local school district to impose maintenance and operations levies, supplemental maintenance and operations levies and emergency fund levies in the maximum amount allowed by law without an election and to impose an educational necessity levy as authorized in this chapter and defined in section 6-2214, Idaho Code.

(3) The local school district shall be given a reasonable time not to exceed thirty-five (35) calendar days to submit a plan for meeting its obligations to provide constitutionally required educational services. If the local school district does not submit a plan within thirty-five (35) calendar days, the district court shall issue an order under subsection (2) or (4) of this section. If the local school district submits a plan, the district court shall independently review the plan and any of the parties' comments to the plan and may modify the plan as it finds necessary in light of the local school district's obligations to provide constitutionally required educational services. Following review, the district court shall enter an order accepting, modifying or rejecting the plan and retaining jurisdiction over the case. If the district court rejects the plan, it shall issue an order under subsection (2) or (4) of this section.

(4) The district court may issue any of the following orders:

(a) If the local school district offers educational or other services not federally mandated and not constitutionally required, the district court may enjoin the local school district from offering some or all of those services not federally mandated and not constitutionally required.

(b) If the local school district offers some of the services that are constitutionally required in a manner that consumes more of the local school district's resources than necessary to provide the constitutionally required services that it does offer, the district court may enjoin the local school district from offering some or all of the constitutionally required services in a manner that consumes more of the local district's resources than necessary.

(c) If the local school district does not impose a maintenance and operations levy, a supplemental maintenance and operations levy, and an emergency fund levy in the maximum amounts allowed by law without an election, or if the sum of the local school district's maintenance and operations levy, supplemental maintenance and operations levy, and emergency fund levy does not equal or exceed the maximum maintenance and operations levy and emergency fund levy that may be imposed by law plus the simple average supplemental maintenance and operations levy of all the school districts in the state, pursuant to section 6-2210, Idaho Code, the district court may order the local school district to impose maintenance and operations levies, supplemental maintenance and operations levies, and emergency fund levies in the maximum amount allowed by law without an election and to impose an educational necessity levy as authorized by this chapter.

(d) If the district court finds that any other order or mandate would assist the local school district in providing constitutionally required educational

services, the district court may issue any order that it determines would assist the local school district in providing constitutionally required educational services.

History.
I.C., § 6-2209, as added by 1996, ch. 258, § 1, p. 845.

JUDICIAL DECISIONS

Cited in: Osmunson v. State, 135 Idaho 292, 17 P.3d 236 (2000).

6-2210. Further inquiry about tax levies — Orders. — (1) If the district court finds:

(a) That the local school district cannot offer federally mandated services and constitutionally required educational services because it does not have sufficient revenues; or

(b) That if the local school district were to offer the constitutionally required educational services that it does offer in a manner that consumes no more of the local school district's resources than necessary, it would still be unable to offer federally mandated services and constitutionally required educational services because it does not have sufficient revenues;

then the district court shall then find the sum of the maintenance and operations levies, supplemental maintenance and operations levies, and emergency fund levies imposed by the local school district and compare the sum to the sum of maintenance and operations levies and emergency fund levies in the maximum amount allowed by law plus the simple average of the supplemental maintenance and operations levies imposed by all school districts in the state.

(2) Orders following further inquiry about tax levies.

(a) If the district court finds:

(i) That the local school district cannot offer federally mandated educational services and constitutionally required educational services because it does not have sufficient revenues;

(ii) That if the local school district were to offer the constitutionally required educational services in a manner that consumes no more of the local school district's resources than necessary, it would still be unable to offer federally mandated educational services and constitutionally required educational services because it does not have sufficient revenues; and

(iii) That the sum of the local school district's levies totaled in subsection (1) of this section equals or exceeds the comparison made in subsection (1) of this section;

the district court shall issue an order authorizing the plaintiffs to add the state and/or the legislature as defendants.

(b) If the district court finds:

(i) That the local school district cannot offer federally mandated educational services and constitutionally required educational services because it does not have sufficient revenues;

(ii) That if the local school district were to offer the constitutionally required educational services in a manner that consumes no more of the local school district's resources than necessary, it would still be unable to offer federally mandated educational services and constitutionally required educational services because it does not have sufficient revenues; and

(iii) The sum of the local school district's levies totaled in subsection (1) of this section do not equal or exceed the comparison made in subsection (1) of this section;

notwithstanding any other provision of law to the contrary, the district court shall issue an order directing the local school board to impose maintenance and operations levies and emergency fund levies in the maximum amount that may be imposed by law. Furthermore, if the sum of the maximum maintenance and operations levy and emergency fund levy that may be imposed by law plus the supplemental maintenance and operations levy does not exceed the comparison made in subsection (1) of this section, the district court shall order the local school board to adopt an educational necessity levy in an amount so that the sum of the maintenance and operations levy, the supplemental maintenance and operations levy, the emergency fund levy, and the educational necessity levy equals the comparison set forth in subsection (1) of this section. The district court shall issue an order directing that all tax revenues from the additional amounts levied pursuant to this subsection be directed first to meeting the local school district's obligations to provide constitutionally required educational services, but may allow the local school district to reduce any of the levies that it was ordered to raise upon the local school district's proof that it is then providing constitutionally required educational services. The district court shall have continuing jurisdiction to see that the additional tax revenues are spent according to its order.

History.
I.C., § 6-2210, as added by 1996, ch. 258, § 1, p. 845.

6-2211. District court's continuing jurisdiction. — When the district court has issued an order over which it has continuing jurisdiction under this chapter, the district court may review as necessary, but not less than annually, the question whether the local school district has complied with its obligation to offer constitutionally required educational services. Upon its review, the district court shall take the following actions:

(1) If the district court finds that the local school district has at that time complied with its obligation to provide constitutionally required educational services, it shall issue a declaratory judgment to that effect, and it may dissolve any orders previously in place as it finds appropriate.

(2) If the district court finds that the local school district has not yet complied with its obligations to provide constitutionally required educational services, but is making good faith progress toward compliance with its obligations to provide constitutionally required educational services, it shall issue an interlocutory finding to that effect and continue its jurisdiction.

(3) If the district court finds that:
(a) The local school district has not yet complied with its obligations to provide constitutionally required educational services;
(b) The local school district does not offer educational or other services not federally mandated or constitutionally required;
(c) The local school district does not offer constitutionally required educational services in a manner that consumes more of the local school district's resources than necessary to provide the constitutionally required educational services that it does offer;
(d) The sum of the local school district's maintenance and operations levy, supplemental maintenance and operations levy, emergency fund levy, and educational necessity levy equals or exceeds the comparison made in section 6-2210(1), Idaho Code; and
(e) The local school district does not have the resources to meet its obligation to provide constitutionally required educational services;
the district court shall issue an order authorizing the plaintiffs to add the state and/or the legislature as defendants.

(4) If the district court finds that the local school district has not yet complied with its obligations to provide constitutionally required educational services and is not making good faith efforts toward substantial compliance, it shall continue its jurisdiction and may issue such orders as it finds necessary to compel good faith efforts on the local school district's part, including an order for state supervision.

History.
I.C., § 6-2211, as added by 1996, ch. 258, § 1, p. 845.

6-2212. State supervision. — When authorized by law, the district court, or the state board of education pursuant to section 33-909, Idaho Code, may issue an order for state supervision of a local school district. When an order for state supervision of a local school district is entered by the district court, the superintendent of public instruction shall within thirty-five (35) calendar days appoint, at local school district expense, an officer to be known as a district supervisor. When an order for state supervision of a local school district is entered by the state board of education, the district supervisor shall be appointed pursuant to section 33-909, Idaho Code, at local school district expense. The district supervisor shall have authority to approve or disapprove any actions of the board of the local school district, to supervise or dismiss superintendents, assistant superintendents, and any other district administrative personnel, and to take any actions necessary to further the local school district's obligations to provide constitutionally required educational services. In the case of appointment by the superintendent of public instruction, the district supervisor shall serve at the pleasure of the superintendent of public instruction until removed by the superintendent of public instruction or the superintendent of public instruction reports to the district court that the local school district is in substantial compliance with its obligations to provide constitutionally required educational services, or until the district court, upon its

own motion or upon motion of any of the parties, orders state supervision to end. In the case of appointment by the state board of education, the district supervisor shall serve pursuant to section 33-909, Idaho Code.

History.
I.C., § 6-2212, as added by 1996, ch. 258, § 1, p. 845; am. 2006, ch. 311, § 2, p. 957.

STATUTORY NOTES

Cross References.
Superintendent of public instruction, § 67-1501 et seq.

Amendments.
The 2006 amendment, by ch. 311, in the first sentence, substituted "by law" for "in this chapter" and inserted "or the state board of education pursuant to section 33-909, Idaho Code"; inserted "by the district court" in the second sentence; added the third sentence; in the fifth sentence, added "In the case of appointment by the superintendent of public instruction"; and added the sixth sentence.

Legislative Intent.
Section 1 of S.L. 2006, ch. 311 provided "Legislative Findings and Intent. The Legislature hereby finds that:

"(1) Section 1, Article IX, of the Constitution of the state of Idaho provides that 'it shall be the duty of the legislature of Idaho, to establish and maintain a general, uniform and thorough system of public, free common schools.'

"(2) In the case of *Idaho Schools for Equal Educational Opportunity v. Evans*, 123 Idaho 573 (1993), the Idaho Supreme Court held that the then existing State Board of Education rules for school facilities, textbooks and curriculum, and transportation systems were consistent with the thoroughness requirements of Section 1, Article IX, of the Constitution of the state of Idaho. The Supreme Court remanded the case for trial to determine if the system of funding was providing such school facilities, textbooks and curriculum, and transportation systems called for in the rules.

"(3) In response to that action, the Legislature enacted Section 33-1612, Idaho Code, which defined thoroughness and included 'a safe environment conducive to learning' among the statutory definitions of thoroughness.

"(4) In a subsequent ruling in the same case, *Idaho Schools for Equal Educational Opportunity v. State*, 132 Idaho 559 (1999), the Idaho Supreme Court held that the statutory requirement of 'a safe environment conducive to learning' and the rules adopted pursuant to it were consistent with the thoroughness requirements of Section 1, Article IX, of the Constitution of the state of Idaho, and that such a safe environment was inherently part of a thorough system of public, free common schools required by Section 1, Article IX, of the Constitution of the state of Idaho. The Supreme Court remanded the case to the district court to determine whether the funding system was providing a safe environment conducive to learning.

"(5) On February 5, 2001, the Fourth Judicial District Court entered findings of fact and conclusions of law that the system of school funding then in existence was constitutionally deficient in its ability to repair or replace dangerous or unsafe conditions in school buildings.

"(6) On December 21, 2005, on appeal to the Supreme Court, the Idaho Supreme Court affirmed the district court's February 5, 2001, decision and said:

> "In sum, the evidence in the record clearly supports the district court's 2001 Findings. We affirm the conclusion of the district court that the current funding system is simply not sufficient to carry out the Legislature's duty under the constitution. While the Legislature has made laudable efforts to address the safety concerns of various school districts, the task is not yet complete. The appropriate remedy, however, must be fashioned by the Legislature and not this Court. Quite simply, Article IX of our constitution means what it says: '[I]t shall be the duty of the Legislature of Idaho, to establish and maintain a general, uniform and thorough system of public, free common schools.' Thus, it is the duty of the State, and not this Court or the local school districts, to meet this constitutional mandate."

"(7) In response to the Supreme Court's 2005 decision, and mindful that the Supreme Court has recognized the Legislature's efforts, following the district court's decision in 2001, to provide a system of funding that provides safe schools, it is the purpose of this Act to fulfill the Legislature's responsibility under Section 1, Article IX, of the Constitution of the state of Idaho, by establishing an ongoing, state-funded system for funding repair or replacement of unsafe school facilities in a manner that fairly and equitably balances the

state and local contributions. It requires funds to be dedicated to maintenance to arrest deterioration of schools before they become unsafe.

"(8) In proposing this Act, it is the intent of the Legislature to:

"(a) Amend the statutes addressing the School District Building Account to provide an ongoing means of providing funds from that account for the purpose of assisting school districts to fund repair or replacement of unsafe school facilities; and

"(b) Remove all artificial limits on the functioning of the bond levy equalization value index. The index measures a school district's relative ability to pay, and provides a secure, ongoing revenue source for the bond levy equalization program, enabling each school district's full share of state lottery funds to be used for school building maintenance and repairs; and

"(c) Establish an ongoing School Facilities Cooperative Funding Program to assist school districts to fund repair or replacement of unsafe school buildings when school districts are unable to fund necessary repair or replacement; and

"(d) Provide ongoing, fair and equitable state assistance to school districts under the School Facilities Cooperative Funding Program whereby the state initially funds the total cost of repair and replacement that school districts are unable to fund themselves. It creates the necessary taxing authority to pay the school district's share of the cost of repair or replacement, and establishes a statutory formula to annually determine the school district's fair and equitable share of the costs of repair or replacement that compares the school district's bonds and/or plant facilities levy rates to the statewide average bond and/or facility levy rate; and

"(e) Require each school district to annually set aside an adequate amount of moneys for the exclusive purpose of school building maintenance in order to arrest deterioration in school facilities that have lead to unsafe conditions and to provide a sliding scale of state match subsidies for this amount based upon the school district's relative ability to pay."

Compiler's Notes.

Section 13 of S.L. 2006, ch. 311 provided: "Section 13. Nonseverability. With the exception of Sections 4, 11 and 12 of this act, the remaining provisions of this act are hereby declared to be nonseverable and if any provision of the remaining portions of this act or the application of such provision to any person or circumstance is declared invalid for any reason, such declaration shall render all such remaining portions of this act null, void and of no force or effect."

6-2213. Suit against state. — When the district court has authorized the plaintiffs to add the state or the legislature as defendants in a suit brought under this chapter, if the legislature is not already party to the suit, the legislature may move to reopen the proceedings to present evidence with regard to the district court's findings that preceded the district court's authorization to sue the state and/or the legislature, or it may stand on the record and findings before the district court. Following any additional evidence that may be offered after the state and/or the legislature is added as a defendant, if the district court finds that:

(1) The local school district has not yet complied with its obligations to provide constitutionally required educational services;

(2) The local school district does not offer educational or other services not federally mandated or constitutionally required;

(3) The local school district does not offer the constitutionally required educational services that it does offer in a manner that consumes more of the local school district's resources than necessary to provide the constitutionally required educational services that it does offer;

(4) The sum of the local school district's maintenance and operations levy, supplemental maintenance and operations levy, emergency fund levy, and educational necessity levy equal or exceed the comparison made in section 6-2210(1), Idaho Code; and

(5) The local school district does not have the resources to meet its obligation to provide constitutionally required educational services;

the district court shall enter a declaratory judgment finding that the system of public, free common schools established by law is unconstitutional as applied to the patrons of that local school district. If the district court cannot make all of these five (5) findings, it shall dismiss the complaint against the state and/or the legislature, but retain jurisdiction over the other defendants as necessary. The district court shall not issue any other final judgments or orders against the state and/or the legislature except as authorized by this section.

History.
I.C., § 6-2213, as added by 1996, ch. 258, § 1, p. 845.

6-2214. Educational necessity levy. — (1) In general. There is hereby created an educational necessity levy that may be levied by a local school district as authorized in this chapter. The educational necessity levy shall expire upon order of the district court having jurisdiction over a suit brought under this chapter or five (5) years after it comes into existence, whichever comes first. An educational necessity levy authorized by this chapter may be imposed under the terms of this chapter, notwithstanding the provisions of section 63-802, Idaho Code.

(2) For safety and health. Notwithstanding any other provisions of this chapter, the district court may impose an educational necessity levy for the purpose of raising revenues to abate unsafe or unhealthy conditions that have been identified by findings of fact or a judgment of the district court, by a consent agreement that has been accepted (with or without modification) by the district court, or by a local school district plan to abate unsafe or unhealthy conditions that has been accepted (with or without modification) by the district court. The district court shall approve an educational necessity levy if it finds that the school district has no alternative source of revenue to use to abate unsafe or unhealthy conditions that have been identified by findings of fact or judgment of the district court, by a consent agreement that has been accepted (with or without modification) by the district court or by a local school district plan to abate unsafe or unhealthy conditions that has been accepted (with or without modification) by the district court. The limitations of sections 6-2209 and 6-2210, Idaho Code, regarding the calculation of and the maximum amount of the educational necessity levy do not apply to an educational necessity levy imposed to abate unsafe or unhealthy conditions that have been identified by findings of fact or a judgment of the district court, by a consent agreement that has been accepted (with or without modification) by the district court, or by a local school district plan to abate unsafe or unhealthy conditions that has been accepted (with or without modification) by the district court.

History.
I.C., § 6-2214, as added by 1996, ch. 258, § 1, p. 845; am. 2003, ch. 339, § 2, p. 913.

STATUTORY NOTES

Legislative Intent.

Section 1 of S.L. 2003, ch. 339 read: "Legislative Findings. The Legislature finds that over twelve years of litigation regarding Idaho's system of school funding has not productively used the state's resources to ensure that there is a general, uniform and thorough system of public, free common schools. Trial was held in the spring of 2000, but no final judgment or appealable order has been issued and no findings of fact specifying which school districts are unable to provide safe and healthy school facilities under the current system of school financing have been issued. Current proceedings are likely to be even more protracted if a special master is appointed and there is further delay until final judgment, an appealable order, or findings of fact specifying which school districts are unable to provide safe and healthy school facilities under the current system of school financing have been issued. The Legislature therefore determines it can best exercise its constitutional duty to establish and maintain a general, uniform and thorough system of public, free common schools by altering the procedure of the existing lawsuit to bring it under the Constitutionally Based Educational Claims Act, which will allow the parties to focus on districts having the most serious health and safety problems, and to provide a remedy of an educational necessity levy or a safe school facility levy as necessary to abate unsafe or unhealthy conditions."

Effective Dates.

Section 4 of S.L. 2003, ch. 339 declared an emergency. Approved May 3, 2003.

JUDICIAL DECISIONS

Constitutionality.

House Bill 403 (chapter 339) of the 2003 Idaho legislative session, as it amended § 6-2214, violated Idaho Const. art. I, § 1 because it gave the judiciary the power to tax by providing that the district court would impose an educational necessity levy on local school districts if necessary. Idaho Schs. for Equal Educ. Opportunity v. State, 140 Idaho 586, 97 P.3d 453 (2004).

6-2215. Effect on pending lawsuits. — (1) Chapter to apply to pending lawsuits. This chapter shall apply to any lawsuit pending on its effective date that has not proceeded to final judgment in the district court on the effective date of this amendment to this section if the lawsuit presents constitutionally based educational claims or counterclaims by any patrons or by the state of Idaho or state officers and shall apply to any lawsuit bringing a constitutionally based educational claim filed after its effective date.

(2) Procedure for pending lawsuits. If this chapter applies to a lawsuit pending on the effective date of this amendment to this section, all proceedings in the lawsuit shall be suspended for fifty-six (56) days from the effective date of this amendment to this section, except to notify the district court of the passage of this amendment and to allow refiling of complaints consistent with this subsection. Any patrons who are parties to such a lawsuit shall have the fifty-six (56) days of the suspension period to file parens patriae complaint(s) consistent with the requirements of this chapter. The legislature and superintendent of public instruction shall have the fifty-six (56) days of the suspension period to file parens patriae complaint(s) consistent with the requirements of this chapter. If a patron files a parens patriae complaint under this subsection, the legislature and the superintendent of public instruction may intervene as a matter of right pursuant to section 6-2206, Idaho Code, within the time period prescribed by section 6-2206, Idaho Code. If any complaints are filed under this subsection, separate complaints shall be filed for each school district that is a defendant, and venue for such a suit against a school district shall be in the county in

which the school district maintains its principal business office. At the expiration of the fifty-six (56) day suspension period described in the first sentence of this subsection, any school districts that are defendants to patron suits or to parens patriae suits under this chapter shall be able to answer as provided by the Idaho rules of civil procedure. All further proceedings in such a suit shall be pursuant to this chapter.

(3) Dismissal of entities not parties and transfer of records in pending lawsuit. School districts that were parties to a lawsuit that presented constitutionally based educational claims or counterclaims on the effective date of this section and that are not defendants in any complaints filed pursuant to subsection (2) of this section shall no longer be parties and shall be dismissed from any proceedings that were suspended. Any defendant to a lawsuit that presented constitutionally based educational claims or counterclaims on the effective date of this section and who is not a defendant authorized by this chapter shall be dismissed from any proceeding that was suspended. Any plaintiff, defendant or an intervenor as of right to a lawsuit filed under subsection (2) of this section in which there is a school district that was a party to a lawsuit that presented constitutionally based educational claims or counterclaims and which lawsuit was suspended under subsection (2) of this section may designate the portions of the records of the suspended lawsuit that pertain to the school district. Upon written request of the plaintiff, the defendant, or an intervenor as of right or the court in a lawsuit filed under subsection (2) of this section, those parts of the record designated by the plaintiff, defendant or an intervenor as of right or the court shall be copied by the clerk of the district court of the suspended lawsuit and forwarded to the clerk of the district court presiding over the complaint filed under subsection (2) of this section and shall be included in the record of that case.

History.

I.C., § 6-2215, as added by 1996, ch. 258, § 1, p. 845; am. 2003, ch. 339, § 3, p. 913.

STATUTORY NOTES

Cross References.

Superintendent of public instruction, § 67-1501 et seq.

Legislative Intent.

Section 1 of S.L. 2003, ch. 339 read: "Legislative Findings. The Legislature finds that over twelve years of litigation regarding Idaho's system of school funding has not productively used the state's resources to ensure that there is a general, uniform and thorough system of public, free common schools. Trial was held in the spring of 2000, but no final judgment or appealable order has been issued and no findings of fact specifying which school districts are unable to provide safe and healthy school facilities under the current system of school financing have been issued. Current proceedings are likely to be even more protracted if a special master is appointed and there is further delay until final judgment, an appealable order, or findings of fact specifying which school districts are unable to provide safe and healthy school facilities under the current system of school financing have been issued. The Legislature therefore determines it can best exercise its constitutional duty to establish and maintain a general, uniform and thorough system of public, free common schools by altering the procedure of the existing lawsuit to bring it under the Constitutionally Based Educational Claims Act, which will allow the parties to focus on districts having the most serious health and safety problems, and to provide a remedy of an educational necessity levy or a safe school facility levy as necessary to abate unsafe or unhealthy conditions."

Compiler's Notes.

The phrase "[t]his chapter shall apply to any lawsuit pending on its effective date" in subsection (1) is from S.L. 1996, ch. 258, which was effective "on and after passage and approved [March 15, 1996], and retroactively to January 1, 1996."

The phrase "the effective date of this amendment to this section" in subsections (1) and (2) are from S.L. 2003, ch. 339, which was effective May 3, 2003.

The phrase "filed after its effective date" at the end of subsection (1) refers to the original effective date of chapter 122, title 6, Idaho Code, as enacted by S.L. 1996, ch. 258, which was effective March 5, 1996, and retroactively to January 1, 1996.

The phrase "effective date of this section" in subsection (3) refers to the effective date of S.L. 2003, ch. 339, which was May 3, 2003.

Effective Dates.

Section 4 of S.L. 2003, ch. 339 declared an emergency. Approved May 3, 2003.

JUDICIAL DECISIONS

Constitutionality.

House Bill 403 (chapter 339) of the 2003 Idaho legislative session, as it amended § 6-2215, violated Idaho Const. art. III, § 19 because the language of the bill was aimed at essentially disbanding a group's education case against the state and restructuring it in a manner that destroyed the group's cause of action, and was clearly a special law. Further, the legislation directly contradicted Idaho court procedure and effectively dismissed parties to a pending lawsuit without any court action, and there was no necessity present, pursuant to Idaho Const. art. V, § 13, meriting the legislature's attempt to legislate itself out of the lawsuit. Idaho Schs. for Equal Educ. Opportunity v. State, 140 Idaho 586, 97 P.3d 453 (2004).

6-2216. Severability. — The provisions of this act are hereby declared to be severable and if any provision of this act or the application of such provision to any person or circumstance is declared invalid for any reason, such declaration shall not affect the validity of the remaining portions of this act.

History.

I.C., § 6-2216, as added by 1996, ch. 258, § 1, p. 845.

STATUTORY NOTES

Compiler's Notes.

The words "this act" refer to S.L. 1996, ch. 258, which is compiled as § 6-2201 et seq.

Effective Dates.

Section 2 of S.L. 1996, ch. 258 declared an emergency and provided that the act shall be in full force and effect on and after its passage and approval, retroactive to January 1, 1996. Approved March 15, 1996.

CHAPTER 23

CLAIMS AGAINST NURSING FACILITIES

6-2301. Prelitigation hearing panel — Licensed nursing facilities. — In the event of an alleged negligence or wrongful death case involving a claim for damages against a licensed nursing facility operating in the state of Idaho, the Idaho state board of examiners of nursing home administrators is directed to cooperate in providing a prelitigation hearing

panel. The panel shall operate in the nature of a special civil grand jury and procedure for prelitigation consideration of personal injury and wrongful death claims for damages arising out of the provision of or alleged failure to provide medical, nursing, or health care services in the state of Idaho. The proceedings shall be informal and nonbinding, but shall be compulsory as a condition precedent to litigation. Proceedings conducted or maintained under the authority of this chapter shall at all times be subject to disclosure according to chapter 3, title 9, Idaho Code. Formal rules of evidence shall not apply and all proceedings shall be expeditious and informal.

History.
I.C., § 6-2301, as added by 1999, ch. 395, § 1, p. 1095.

STATUTORY NOTES

Cross References.
Board of examiners of nursing home administrators, § 54-1603.

6-2302. Appointment of hearing panel. — The board of examiners of nursing home administrators shall provide for and appoint an appropriate panel or panels to accept and hear complaints of negligence and damages, made by or on behalf of any patient who is an alleged victim of negligence. The panels shall include one (1) person who is a then serving licensed administrator of a licensed nursing facility in the state of Idaho. One (1) additional member of each such panel shall be appointed by the commissioners of the Idaho state bar, which person shall be a resident lawyer licensed to practice law in the state of Idaho, and shall serve as chairman of the panel. The panelists so appointed shall select by unanimous decision a layman panelist who shall not be a lawyer, doctor or nursing facility employee but who shall be a responsible adult citizen of Idaho. All panelists shall swear under oath that they are without bias or conflict of interest as respects any matter under consideration.

History.
I.C., § 6-2302, as added by 1999, ch. 395, § 1, p. 1095.

STATUTORY NOTES

Cross References.
Board of examiners of nursing home administrators, § 54-1603.
Board of commissioners of the Idaho state bar, § 3-401 et seq.

6-2303. Fees — Confidentiality. — The Idaho state board of examiners of nursing home administrators shall provide, by uniform policy of the board, for the payment of fees and expenses of members of panels, such payment to be made from the occupational licenses fund. Panel members shall serve upon the sworn commitment that all related matters shall be subject to disclosure according to chapter 3, title 9, Idaho Code, and privileged.

History.
I.C., § 6-2303, as added by 1999, ch. 395, § 1, p. 1095.

STATUTORY NOTES

Cross References.
Board of examiners of nursing home administrators, § 54-1603.
Occupational licenses account, § 67-2605.

6-2304. Application of laws. — Sections 6-1003, 6-1004, 6-1005, 6-1006, 6-1007, 6-1008, 6-1009 and 6-1011, Idaho Code, shall apply to prelitigation panels conducted pursuant to this chapter.

History.
I.C., § 6-2304, as added by 1999, ch. 395, § 1, p. 1095.

CHAPTER 24

LIABILITY FOR EMERGENCY RESPONSES

SECTION.

6-2401. Liability for emergency responses. — (1) Any person who knowingly enters into any area that has been closed to the public by competent authority for any reason, where such closure is posted by sign, barricade or other device, is liable for the expenses of an emergency response required to search for or rescue such person or, if the person was operating a vehicle, any of his or her passengers, plus expenses for the removal of any inoperable vehicle. This section shall not apply to any person who is authorized by the land owner, lessor or manager of the closed area, to be in the closed area, and further shall have no application to any federal, state or local government official who is in the closed area as part of his or her official duty, nor to any person acting in concert with a government authorized search or rescue.

(2) Unless otherwise provided by law, subsection (1) of this section shall apply only to persons eighteen (18) years of age or older and shall apply to all such persons irrespective of whether the person is on foot, on skis or snowshoes, or is operating a motor vehicle, bicycle, vessel, watercraft, raft, snowmobile, all-terrain vehicle, or any other boat or vehicle of any description.

(3) Unless otherwise provided by law, subsection (1) of this section shall only apply to the person who knowingly enters the closed area, and not to his or her family, heirs or assigns.

(4) Expenses of an emergency response are a charge against the person liable for those expenses pursuant to subsection (1) of this section. The charge constitutes a debt of that person and may be collected proportionately by the public agencies, for-profit entities and not-for-profit entities that

incurred the expenses. The person's liability for expenses of an emergency response shall not exceed four thousand dollars ($4,000) for a single incident. The liability imposed under this section is in addition to and not in limitation of any other liability that is imposed.

(5) An insurance policy may exclude coverage for a person's liability for expenses of an emergency response under this section.

(6) Any public agency or private entity that receives full reimbursement from the state search and rescue fund shall not attempt to collect any money from the person. In such cases, the debt described in subsection (4) of this section is collectable by the state of Idaho for reimbursement to the state search and rescue fund.

(7) For purposes of this section:

(a) "Expenses of an emergency response" means those reasonable and necessary costs directly incurred by public agencies, for-profit entities or not-for-profit entities that make an appropriate emergency response to an incident, and shall include the cost of providing police, firefighting, search and rescue, and emergency medical services at the scene of an incident and the salaries of the persons who respond to the incident.

(b) "Public agency" means this state and any city, county, municipal corporation or other public authority that is located in whole or in part in this state and that provides police, firefighting, medical or other emergency services.

History.
I.C., § 6-2401, as added by 2002, ch. 267, § 1, p. 797; am. 2003, ch. 38, § 1, p. 157.

STATUTORY NOTES

Cross References.
Search and rescue fund, § 67-2913.

Effective Dates.
Section 2 of S.L. 2003, ch. 38 declared an emergency. Approved March 11, 2003.

6-2402. Volunteer fire departments — Schedule of charges — Conditions for collection — Reports — Failure to pay. — (1) As used in this section, "volunteer fire department" means a fire department organized as a nonprofit corporation with a primary purpose of firefighting, fire protection, or other emergency services, which has entered into an agreement with a validly organized city or county to provide fire fighting, fire protection, or other emergency services to a distinct service area.

(2) A volunteer fire department that provides services within a jurisdiction served by the department may establish a schedule of charges for the services that the department provides not to exceed the state fire marshal's recommended schedule for services. The volunteer fire department or its agent may collect a service charge according to this schedule from the owner of property who receives service if the following conditions are met:

(a) At the following times, the department gives notice in a newspaper of general circulation on three (3) separate occasions in each political subdivision served by the department of the amount of the service charge for each service that the department provides:

(i) Before the schedule of service charges is initiated;

(ii) When there is a change in the amount of a service charge.

(b) The property owner has not sent written notice to the department to refuse service by the department to the owner's property.

(c) The bill for payment of the service charge:

(i) Is submitted to the property owner in writing within thirty (30) days after services are provided; and

(ii) Includes a copy of a fire incident report in the form prescribed by the state fire marshal, if the service was provided for an event that requires a fire incident report.

(3) A volunteer fire department shall use the revenue collected from the fire service charges under this section for:

(a) The purchase of equipment, buildings and property for firefighting, fire protection or other emergency services;

(b) The ordinary and necessary expenses associated with firefighting, fire protection and other emergency services; and

(c) To pay principal and interest on a loan acquired for the purchase of equipment, buildings and property for firefighting, fire protection and other emergency services.

(4) A volunteer fire department that:

(a) Has contracted with a political subdivision to provide fire protection or emergency services, and

(b) Charges for services under the provisions of this section,

shall submit a report to the legislative body of the political subdivision before April 1 of each year indicating the amount of service charges collected during the previous calendar year and how those funds have been expended.

(5) The state fire marshal shall annually prepare and publish a recommended schedule of service charges for fire protection services.

(6) The volunteer fire department or its agent may maintain a civil action to recover an unpaid service charge authorized under the provisions of this section.

History.
I.C., § 6-2402, as added by 2005, ch. 305, § 1, p. 953.

STATUTORY NOTES

Cross References.
State fire marshal, § 41-254.

CHAPTER 25

NOTICE AND OPPORTUNITY TO REPAIR ACT

6-2501. Short title. — This chapter shall be known and may be cited as the "Notice and Opportunity to Repair Act."

History.
I.C., § 6-2501, as added by 2003, ch. 133, § 1, p. 386.

JUDICIAL DECISIONS

Purpose.
The purpose of this chapter is to give contractors the opportunity to fix construction defects before a lawsuit is filed. Mendenhall v. Aldous, 146 Idaho 434, 196 P.3d 352 (2008).

6-2502. Definitions. — Unless the context clearly requires otherwise, as used in this chapter:

(1) "Action" means any civil lawsuit or action in contract or tort for damages or indemnity brought against a construction professional to assert a claim, whether by complaint, counterclaim or cross-claim, for damage or the loss of use of real or personal property caused by a defect in the construction of a residence or in the substantial remodel of a residence. "Action" does not include any civil action in tort alleging personal injury or wrongful death to a person or persons resulting from a construction defect.

(2) "Association" means a homeowner's association, condominium management body, unit owner's organization or a nonprofit corporation created to own and operate portions of a planned community which has the power to assess unit owners to pay the costs and expenses incurred in the performance of the association's obligations.

(3) "Claimant" means a homeowner or association that asserts a claim against a construction professional concerning a defect in the construction of a residence or in the substantial remodel of a residence.

(4) "Construction professional" means any person with a right to lien pursuant to section 45-501, Idaho Code, an architect, subdivision owner or developer, builder, contractor, subcontractor, engineer or inspector, performing or furnishing the design, supervision, inspection, construction or observation of the construction of any improvement to residential real property, whether operating as a sole proprietor, partnership, corporation, limited liability company or other business entity.

(5) "Homeowner" means:

(a) Any person who contracts with a construction professional for the construction, sale, or construction and sale of a residence; and

(b) An association as defined in this section.

"Homeowner" includes a subsequent purchaser of a residence from any homeowner.

(6) "Person" means an individual, an association as defined in this section, or a corporation, business trust, estate, trust, partnership, limited liability company, joint venture or other legal business entity.

(7) "Residence" means a single-family house, duplex, triplex, quadraplex, condominium or a unit in a multiunit residential structure in which title to each individual unit is transferred to the owner under a cooperative system.

(8) "Serve" or "service" means personal service or delivery by certified mail to the last known address of the addressee.

(9) "Substantial remodel" means a remodel of a residence, for which the total cost exceeds one-half (1/2) of the assessed value of the residence for property tax purposes at the time the contract for the remodel work was made.

History.
I.C., § 6-2502, as added by 2003, ch. 133, § 1, p. 386.

JUDICIAL DECISIONS

"Residence".
A detached shop, although built at the same time as a home, is not a "residence": therefore, the notice provisions of this chapter are not mandatory before an action for a defect in construction may be commenced. Mendenhall v. Aldous, 146 Idaho 434, 196 P.3d 352 (2008).

6-2503. Notice and opportunity to repair. — (1) Prior to commencing an action against a construction professional for a construction defect, the claimant shall serve written notice of claim on the construction professional. The notice of claim shall state that the claimant asserts a construction defect claim against the construction professional and shall describe the claim in reasonable detail sufficient to determine the general nature of the defect. Any action commenced by a claimant prior to compliance with the requirements of this section shall be dismissed by the court without prejudice and may not be recommenced until the claimant has complied with the requirements of this section. If a written notice of claim is served under this section within the time prescribed for the filing of an action under this chapter, the statute of limitations for construction-related claims is tolled until sixty (60) days after the period of time during which the filing of an action is barred.

(2) Within twenty-one (21) days after service of the notice of claim, the construction professional shall serve a written response on the claimant. The written response shall:

(a) Propose to inspect the residence that is the subject of the claim and to complete the inspection within a specified time frame. The proposal shall include the statement that the construction professional shall, based on the inspection, offer to remedy the defect, compromise by payment, or dispute the claim;

(b) Offer to compromise and settle the claim by monetary payment without inspection; or

(c) State that the construction professional disputes the claim and will neither remedy the construction defect nor compromise and settle the claim.

(3)(a) If the construction professional disputes the claim or does not respond to the claimant's notice of claim within the time stated in subsection (2) of this section, the claimant may bring an action against the construction professional for the claim described in the notice of claim without further notice.

(b) If the claimant rejects the inspection proposal or the settlement offer made by the construction professional pursuant to subsection (2) of this

section, the claimant shall serve written notice of the claimant's rejection on the construction professional. After service of the rejection, the claimant may bring an action against the construction professional for the construction defect claim described in the notice of claim. If the construction professional has not received from the claimant, within thirty (30) days after the claimant's receipt of the construction professional's response, either an acceptance or rejection of the inspection proposal or settlement offer, then at anytime thereafter the construction professional may terminate the proposal or offer by serving written notice to the claimant, and the claimant may thereafter bring an action against the construction professional for the construction defect claim described in the notice of claim.

(4)(a) If the claimant elects to allow the construction professional to inspect in accordance with the construction professional's proposal pursuant to subsection (2)(a) of this section, the claimant shall provide the construction professional and its contractors or other agents reasonable access to the claimant's residence during normal working hours to inspect the premises and the claimed defect.

(b) Within fourteen (14) days following completion of the inspection, the construction professional shall serve on the claimant:

(i) A written offer to remedy the construction defect at no cost to the claimant, including a report of the scope of the inspection, the findings and results of the inspection, a description of the additional construction necessary to remedy the defect described in the claim and a timetable for the completion of such construction;

(ii) A written offer to compromise and settle the claim by monetary payment pursuant to subsection (2)(b) of this section; or

(iii) A written statement that the construction professional will not proceed further to remedy the defect.

(c) If the construction professional does not proceed further to remedy the construction defect within the agreed timetable, or if the construction professional fails to comply with the provisions of subsection (4)(b) of this section, the claimant may bring an action against the construction professional for the claim described in the notice of claim without further notice.

(d) If the claimant rejects the offer made by the construction professional pursuant to subsection (4)(b)(i) or (ii) of this section to either remedy the construction defect or to compromise and settle the claim by monetary payment, the claimant shall serve written notice of the claimant's rejection on the construction professional. After service of the rejection notice, the claimant may bring an action against the construction professional for the construction defect claim described in the notice of claim. If the construction professional has not received from the claimant, within thirty (30) days after the claimant's receipt of the construction professional's response, either an acceptance or rejection of the offer made pursuant to subsection (4)(b)(i) or (ii) of this section, then at any time thereafter the construction professional may terminate the offer by serving written notice to the claimant.

(5)(a) Any claimant accepting the offer of a construction professional to remedy the construction defect pursuant to subsection (4)(b)(i) of this section shall do so by serving the construction professional with a written notice of acceptance within a reasonable time period after receipt of the offer and no later than thirty (30) days after receipt of the offer. The claimant shall provide the construction professional and its contractors or other agents reasonable access to the claimant's residence during normal working hours to perform and complete the construction by the timetable stated in the offer.

(b) The claimant and construction professional may, by written mutual agreement, alter the extent of construction or the timetable for completion of construction stated in the offer including, but not limited to, repair of additional defects.

(6) Written or oral statements made by a claimant or by a construction professional in the course of complying with the procedures required or authorized by this section shall not be considered an admission of liability and shall not be admissible in an action subject to this section.

(7) Nothing in this section shall be construed to prevent a claimant from commencing an action on the construction defect claim described in the notice of claim if the construction professional fails to perform the construction agreed upon, fails to remedy the defect or fails to perform by the timetable agreed upon pursuant to subsection (4)(b) or (5)(b) of this section.

History.
I.C., § 6-2503, as added by 2003, ch. 133, § 1, p. 386.

JUDICIAL DECISIONS

ANALYSIS

Notice.
Response to notice.

Notice.
The notice provision of subsection (1) does not require claimants to describe alleged defects with excessive particularity. Instead, the "reasonable detail" requirement is satisfied when a claimant provides a builder with enough information to identify the general nature and location of any construction defect. Mendenhall v. Aldous, 146 Idaho 434, 196 P.3d 352 (2008).

Response to Notice.
Nothing in this section relieves a builder of his obligation to respond to a defect claim solely because a claimant makes a demand for payment. Mendenhall v. Aldous, 146 Idaho 434, 196 P.3d 352 (2008).

6-2504. Limitation on damages. — (1) In a suit subject to section 6-2503, Idaho Code, the claimant may recover only the following damages proximately caused by a construction defect:

(a) The reasonable cost of repairs necessary to cure any construction defect, including any reasonable and necessary engineering or consulting fees required to evaluate and cure the construction defect, that the contractor is responsible for repairing under this chapter;

(b) The reasonable expenses of temporary housing reasonably necessary during the repair period;

(c) The reduction in market value, if any, to the extent that the reduction is due to structural failure; and

(d) Reasonable and necessary attorney's fees.

(2) If a construction professional fails to make a reasonable offer as required under section 6-2503, Idaho Code, or fails to make a reasonable attempt to complete the repairs specified in an accepted offer, or fails to complete, in a good and workmanlike manner, the repairs specified in an accepted offer, the limitations on damages and defenses to liability provided for in this section shall not apply.

(3) If a claimant denies a request to inspect as provided for in section 6-2503, Idaho Code, unreasonably rejects an offer to remedy the construction defect or does not permit the construction professional a reasonable opportunity to repair the defect pursuant to an accepted offer of settlement, the claimant may not recover an amount in excess of:

(a) The reasonable cost of the offered repairs which are necessary to cure the construction defect and which are the responsibility of the construction professional; or

(b) The amount of a reasonable monetary settlement offer made under section 6-2503, Idaho Code; and

(c) The amount of reasonable and necessary attorney's fees and costs incurred before the offer was rejected or considered rejected.

(4) The total damages awarded in a suit subject to this chapter may not exceed the greater of the claimant's purchase price for the residence or the current fair market value of the residence without the construction defect.

(5) A builder, under the principles of comparative fault pertaining to affirmative defenses, may be excused, in whole or in part, from any obligation, damage, loss or liability if the builder can demonstrate any of the following affirmative defenses in response to the claimed construction defect action:

(a) An unforeseen act of nature caused the structure not to meet the standard. For purposes of this section, an "unforeseen act of nature" means a weather condition, earthquake or man-made event such as war, terrorism or vandalism, in excess of the design criteria expressed by the applicable building codes, regulations and ordinances in effect at the time of original construction.

(b) The homeowner unreasonably failed to minimize or prevent those damages in a timely manner. Such failure includes the failure of the homeowner to allow reasonable and timely access for inspections and repairs under this chapter or to give timely notice to the builder after discovery of a construction defect, but does not include damages due to the untimely or inadequate response of a builder to the homeowner's claim of a construction defect.

(c) The homeowner or his or her agent, employee, subcontractor, independent contractor or consultant failed to follow the builder's or manufacturer's recommendations or commonly accepted homeowner maintenance obligations. In order to rely upon this defense as it relates to a

builder's recommended maintenance schedule, the builder must show that the homeowner had written notice of these schedules and recommendations and that the schedules and recommendations were reasonable at the time they were issued.

(d) The damage or loss was caused by the homeowner's or his or her agent's or an independent third party's alterations, ordinary wear and tear, misuse, abuse or neglect, or by the structure's use for something other than its intended purpose.

(e) The time period for filing actions bars the claim.

(f) The action relates to a particular claim for which the builder has obtained a valid release.

(g) The builder's repair was successful in correcting the particular claimed construction defect to the applicable standard.

(6) All applicable affirmative defenses are preserved for causes of action to which this chapter does not apply.

History.
I.C., § 6-2504, as added by 2003, ch. 133, § 1, p. 386.

CHAPTER 26

CLANDESTINE DRUG LABORATORY CLEANUP ACT

SECTION.

6-2601. Short title. — This chapter shall be known and may be cited as the "Clandestine Drug Laboratory Cleanup Act."

History.
I.C., § 6-2601, as added by 2005, ch. 215, § 1, p. 687.

6-2602. Purpose. — The legislature finds that some residential properties are being contaminated with hazardous chemical residues created by the manufacture of clandestine drugs. Innocent members of the public may be harmed when they are exposed to chemical residues if the residential properties are not decontaminated prior to any subsequent rental, sale or use of the properties. The purpose of this chapter is to protect the public health, safety and welfare by authorizing the department of health and welfare to establish a program providing a process and standards for the cleanup of clandestine drug laboratories.

History.
I.C., § 6-2602, as added by 2005, ch. 215, § 1, p. 687.

6-2603. Definitions. — As used in this chapter, unless the context otherwise requires:

(1) "Clandestine drug laboratory" means the areas where controlled substances or their immediate precursors, as those terms are defined in section 37-2701, Idaho Code, have been, or were attempted to be, manufactured, processed, cooked, disposed of or stored, and all proximate areas that are likely to be contaminated as a result of such manufacturing, processing, cooking, disposing or storing.

(2) "Department" means the Idaho department of health and welfare.

(3) "Law enforcement agency" means any policing agency of the state or of any political subdivision of the state.

(4) "Residential property" means any building or structure to be primarily occupied by people, either as a dwelling or as a business, including a storage facility, mobile home, manufactured home or recreational vehicle that may be sold, leased or rented for any length of time. "Residential property" does not include any water system, sewer system, land or water outside of a building or structure.

(5) "Residential property owner" means the person holding record title to residential property, as defined in this section.

History.
I.C., § 6-2603, as added by 2005, ch. 215, § 1, p. 687.

6-2604. Rules. — The department shall promulgate rules establishing the acceptable process and standards for the cleanup of clandestine drug laboratories. The department shall also promulgate rules establishing a program for addition to, and removal from, a list of residential properties that housed a clandestine drug laboratory.

History.
I.C., § 6-2604, as added by 2005, ch. 215, § 1, p. 687.

6-2605. Law enforcement agency responsibility. — Following the adoption of rules pursuant to section 6-2604, Idaho Code, and using a format established by the department, a law enforcement agency, upon locating chemicals, equipment, supplies or immediate precursors indicative of a clandestine drug laboratory on a residential property, shall notify the residential property owner and the department.

History.
I.C., § 6-2605, as added by 2005, ch. 215, § 1, p. 687.

6-2606. Residential property owner cleanup responsibility. — (1) Except as otherwise provided in subsection (2) of this section, and pursuant to rules adopted as provided in this chapter, upon notification to a residential property owner by a law enforcement agency that chemicals, equipment, supplies or immediate precursors indicative of a clandestine drug laboratory have been located on the owner's residential property, the

residential property owner shall meet the cleanup standards established by the department. The residential property shall remain vacant from the time the residential property owner is notified, in accordance with rules adopted as provided in this chapter, of the clandestine drug laboratory until such time as the residential property owner has received a certificate issued by the department evidencing that the cleanup standards have been met.

(2) A residential property owner may, at his or her option, elect to demolish the residential property instead of meeting the cleanup standards established by the department.

History.
I.C., § 6-2606, as added by 2005, ch. 215, § 1, p. 687.

6-2607. Residential property owner immunity. — Once a residential property meets the cleanup standards established by the department pursuant to rules adopted as provided in this chapter, the residential property owner and any representative or agent of the residential property owner shall be immune from civil actions involving health claims brought by any future owner, renter or other person who occupies the residential property, and by any neighbor of such residential property, where the alleged cause of injury or loss is based upon the use of the residential property for the purposes of a clandestine drug laboratory, provided however, that such immunity shall not apply to any person alleged to have produced the clandestine drugs.

History.
I.C., § 6-2607, as added by 2005, ch. 215, § 1, p. 687.

6-2608. Voluntary compliance. — Any residential property owner who chooses to voluntarily and successfully accomplish the cleanup standards established by the department pursuant to rules adopted as provided in this chapter, whether or not such owner was notified by a law enforcement agency, shall be afforded the protections from civil actions provided in section 6-2607, Idaho Code.

History.
I.C., § 6-2608, as added by 2005, ch. 215, § 1, p. 687.

CHAPTER 27

IDAHO SPORT SHOOTING ACTIVITIES IMMUNITY ACT

SECTION.

6-2701. Definitions. — As used in this chapter:

(1) "Engaged in sport shooting activities" means entering and exiting a sport shooting range, preparing to shoot, waiting to shoot, shooting and assisting another person in shooting. The term includes being a spectator, receiving training or otherwise being present on a sport shooting range for any reason;

(2) "Participant" means any person who engages in sport shooting activities, whether or not a fee is paid to participate in such sport shooting activities;

(3) "Sport shooting activities" means the use of firearms, airguns and archery equipment for target practice, competition, training, instruction or other similar activities;

(4) "Sport shooting instructor" means a person who holds a current instructor certification issued by the Idaho department of fish and game, the Idaho state police, the national rifle association or other nationally recognized organization, which certifies shooting instructors who are engaged, whether or not for compensation, in instructing, training or coaching a participant in sport shooting activities;

(5) "Sport shooting official" means a person who holds a current certification as a referee, match director, range officer, range master or other similar function issued by the national rifle association, United States practical shooting association, national range officers institute, USA shooting, international shooting sports federation or other nationally or internationally recognized organization which certifies match officials who are engaged in supervising sport shooting activities;

(6) "Sport shooting range" or "range" means an area designed and operated for the use of rifles, shotguns, pistols, silhouettes, skeet, trap, black powder, archery or any other similar sport shooting;

(7) "Sport shooting range operator" means an individual, group or club, partnership, limited liability company or corporation, whether or not operating for profit, which owns, operates or otherwise provides a range for sport shooting activities; and

(8) "Sport shooting sponsor" means an individual, group or club, partnership, limited liability company or corporation, whether or not operating for profit, which promotes or conducts sport shooting activities.

History.
I.C., § 6-2701, as added by 2009, ch. 195, § 1, p. 628.

STATUTORY NOTES

Compiler's Notes.
For national rifle association, see *http://home.nra.org/#/home*.
For United States practical shooting association, see *http://www.uspsa.org*.
For national range officers institute, see *http://www.nroi.org*.
For USA shooting, see *http://usashooting.com*.
For international shooting sports federation, see *http://www.issf-sports.org*.

6-2702. Limitation of liability on sport shooting activities. — (1) Except as provided in subsection (2) or (3) of this section, a sport

shooting range operator, sport shooting sponsor, sport shooting official or sport shooting instructor shall not be liable for any injury, including an injury causing death, to a participant engaged in sport shooting activities and, except as provided in subsection (2) or (3) of this section, no participant or participant's representative, may maintain an action against, or recover from, a sport shooting range operator, sport shooting sponsor, sport shooting official or sport shooting instructor for an injury to, or the death of, a participant engaged in sport shooting activities.

(2) Nothing in subsection (1) of this section shall prevent or limit the liability of a sport shooting range operator, sport shooting sponsor, sport shooting official or sport shooting range instructor:

(a) If the sport shooting range operator, sport shooting sponsor, sport shooting official or sport shooting instructor:

(i) Commits an act or omission that constitutes gross negligence or willful and wanton disregard for the safety of the participant and that act or omission caused the injury;

(ii) Intentionally injures the participant;

(iii) Fails to exercise ordinary care in the sport shooting range operator's, sport shooting sponsor's, sport shooting official's or sport shooting instructor's own use of a firearm, airgun or archery equipment; or

(iv) Provides firearms, airguns or archery equipment to a participant and fails to exercise ordinary care to determine that the provided firearms, airguns or archery equipment are in a safe operating condition.

(b) Under liability provisions as set forth in the products liability laws;

(c) Under the liability provisions set forth in chapter 9, title 6, Idaho Code; or

(d) Under the provisions of the Idaho worker's compensation law, section 72-101, Idaho Code, et seq.

(3) Nothing in subsection (1) of this section shall prevent or limit the liability of a sport shooting range operator if a participant sustains an injury because of a dangerous latent condition which was known or should have been known to the sport shooting range operator and for which warning signs had not been conspicuously posted.

(4) Nothing in this section shall be construed to enlarge or otherwise adversely affect the liability of any party. This section shall not be construed to impair any defense and any other immunity or bar to a civil lawsuit shall remain in effect.

History.
I.C., § 6-2702, as added by 2009, ch. 195, § 1, p. 628.

CHAPTER 28

LIABILITY OF OUT-OF-STATE EMERGENCY RESPONDER

SECTION.

6-2801. Definitions. — As used in this chapter:

(1) "Emergency" means the occurrence or imminent threat of a condition threatening life or property which requires emergency assistance.

(2) "Emergency responder" means a person employed by or who is a bona fide member of a governmental entity of another state of the United States including, but not limited to, a legally organized law enforcement agency, a legally organized fire department or a licensed emergency medical service provider, and whose primary duty is to serve or protect the safety or life of any person or to protect property. Emergency responder includes, but is not limited to, peace officers, firefighters, ambulance attendants, emergency medical technicians, search and rescue personnel and park rangers.

History.
I.C., § 6-2801, as added by 2010, ch. 138, § 1, p. 292.

STATUTORY NOTES

Compiler's Notes.
Two 2010 acts, chapters 138 and 239, purported to create a new chapter 28 in title 6, Idaho Code. S.L. 2010, ch. 138 has been compiled as chapter 28, title 6, Idaho Code. S.L. 2010, ch. 239 has been compiled as chapter 29, title 6, Idaho Code, through the use of brackets.

Effective Dates.
Section 4 of S.L. 2010, ch. 138 declared an emergency. Approved March 29, 2010.

6-2802. Liability of out-of-state emergency responder. — An emergency responder who enters this state in response to an emergency shall not be liable to another person for damages or injury arising from the conduct of the emergency responder in rendering services in response to an emergency unless it is shown that the emergency responder caused injury or damages to such person as a proximate result of his reckless, grossly negligent or intentional misconduct.

History.
I.C., § 6-2802, as added by 2010, ch. 138, § 1, p. 292.

STATUTORY NOTES

Compiler's Notes.
Two 2010 acts, chapters 138 and 239, purported to create a new chapter 28 in title 6, Idaho Code. S.L. 2010, ch. 138 has been compiled as chapter 28, title 6, Idaho Code. S.L. 2010, ch. 239 has been compiled as chapter 29, title 6, Idaho Code, through the use of brackets.

Effective Dates.
Section 4 of S.L. 2010, ch. 138 declared an emergency. Approved March 29, 2010.

CHAPTER [29] 28

LIVESTOCK ACTIVITIES IMMUNITY ACT

SECTION.

[6-2901] 6-2801. Definitions. — For purposes of this section, the following terms have the following meanings:

(1) "Livestock" means cattle, sheep, swine, goats, llamas, alpacas or poultry.

(2) "Livestock activity" means livestock shows, fairs, competitions, performances, races or parades.

(3) "Livestock activity sponsor" means an individual, group or club, partnership or corporation, whether or not the sponsor is operating for profit or nonprofit, which sponsors, organizes or provides the facilities for a livestock activity including, but not limited to, 4-H clubs, school and college sponsored classes and programs and operators, instructors and promoters of livestock facilities including, but not limited to, fairs and arenas at which the activity is held.

(4) "Livestock professional" means a person engaged for compensation in:

(a) Instructing a participant or renting livestock to a participant; or

(b) Renting equipment to a participant.

(5) "Participant" means any person, whether amateur or professional, who directly engages in a livestock activity, whether or not a fee is paid to participate in the livestock activity.

History.
I.C., § 6-2801, as added by 2010, ch. 239, § 1, p. 620.

STATUTORY NOTES

Compiler's Notes.
Two 2010 acts, chapters 138 and 239, purported to create a new chapter 28 in title 6, Idaho Code. S.L. 2010, ch. 138 has been compiled as chapter 28, title 6, Idaho Code. S.L. 2010, ch. 239 has been compiled as chapter 29, title 6, Idaho Code, through the use of brackets.

[6-2902] 6-2802. Limitation of liability on livestock activities. — (1) Except as provided in subsections (2) and (3) of this section, a livestock activity sponsor or a livestock professional shall not be liable for any injury to or the death of a participant or livestock engaged in a livestock activity and, except as provided in subsections (2) and (3) of this section, no participant nor participant's representative may maintain an action against or recover from a livestock activity sponsor or a livestock professional for an injury to or the death of a participant or livestock engaged in a livestock

activity.

(2) The provisions of this chapter do not apply to the horse or mule racing industry as regulated in chapter 25, title 54, Idaho Code, or to equines regulated in chapter 18, title 6, Idaho Code.

(3) Nothing in subsection (1) of this section shall prevent or limit the liability of a livestock activity sponsor or a livestock professional:

(a) If the livestock activity sponsor or the livestock professional:

(i) Provided equipment and the equipment caused the injury;

(ii) Provided the livestock and failed to make reasonable and prudent efforts to determine the ability of the participant to engage safely in the livestock activity, determine the ability of the livestock to behave safely with the participant, and to determine the ability of the participant to safely manage the particular livestock;

(iii) Owns, leases, rents or otherwise is in lawful possession and control of the land or facilities upon which the participant or livestock sustained injuries because of a dangerous latent condition which was known to or should have been known to the livestock activity sponsor or the livestock professional and for which warning signs have not been conspicuously posted;

(iv) Commits an act or omission that is unreasonable or willfully disregards the safety of the participant or livestock and that act or omission caused the injury; or

(v) Intentionally injures the participant or livestock;

(b) Under liability provisions as set forth in the products liability laws; or

(c) Under the liability provisions set forth in chapter 9, title 6, Idaho Code.

History.

I.C., § 6-2802, as added by 2010, ch. 239, § 1, p. 620.

STATUTORY NOTES

Compiler's Notes.

Two 2010 acts, chapters 138 and 239, purported to create a new chapter 28 in title 6, Idaho Code. S.L. 2010, ch. 138 has been compiled as chapter 28, title 6, Idaho Code. S.L. 2010, ch. 239 has been compiled as chapter 29, title 6, Idaho Code, through the use of brackets.

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